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No. 86-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GLEN MARTIN, *et al.*,
Petitioners,

v.

ANTONIA MONTELONGO, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it was proper to read "vicarious liability" into the Farm Labor Contractor Registration Act in light of Congress' specific consideration and specific rejection of numerous proposals to impose vicarious liability on others for a farm labor contractor's violations.

2. Whether the court of appeals usurped the fact finding responsibility of the district court by finding that defendant Griffin & Brand received a "fee" within the meaning of the Farm Labor Contractor Registration Act, an essential element of the statutory violation that the district court had not addressed.

3. Whether the district court may award liquidated damages for violations of the Farm Labor Contractor Registration Act that are punitive and far in excess of ascertainable actual damages, without giving any reasons for its damage award.

4. Whether the district court may properly certify a Rule 23(b)(3) class action that is based entirely on alleged oral misrepresentations made at different times to many different persons.

5. Whether the district court may certify a Rule 23(b)(3) class action without making any of the findings required by Fed.R.Civ.P. 23 or giving any reasons for its certification decision.

6. Whether the district court may alter the definition of a Rule 23(b)(3) class to include previously excluded persons after it has rendered its decision on the merits and after the statute of limitations has expired with respect to the newly-included class members.

7. Whether the district court may credit the testimony of a witness in the face of undisputed documentary evidence showing that she had lied repeatedly about three major points and her subsequent admission that her testimony was wrong.

PARTIES TO THE PROCEEDINGS BELOW

The respondents before this Court, who were plaintiffs in the district court and appellees-cross appellants in the court of appeals, are approximately 203 crew leaders and migrant farm workers residing in the Rio Grande Valley of Texas and Mexico.

The petitioners before this Court, the defendants before the district court, and the appellants-cross appellees before the court of appeals are the following individuals, corporations, and an unincorporated association of farmers located in the Presidio Valley of Texas:

Presidio Valley Farmers Association
Presidio Valley Farms, Inc.
Griffin & Brand of McAllen, Inc.
Glen Martin
Othal Brand
Bill J. Bishop

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DECISIONS BELOW

The United States District Court for the Southern District of Texas, Brownsville Division, certified Rule 23(b)(2) and 23(b)(3) classes on October 9, 1980. The certification order appears at Appendix A hereof. On September 16, 1982, the district court issued its Memorandum Opinion on liability and damage issues. The opinion, which is not reported, appears at Appendix B hereof. The district court issued its final judgment on May 2, 1985, which it amended on May 6, 1985 and September 12, 1985. See Appendices C, D, and E, respectively.

On November 5, 1986, the United States Court of Appeals for the Fifth Circuit, with Circuit Judge Edith

Jones dissenting on two points, issued its decision affirming in part, vacating in part, and remanding to the district court. That opinion is reported at 803 F.2d at 1341 (5th Cir. 1986) and appears at Appendix F hereof. On December 17, 1986, the Fifth Circuit denied the petitioners' timely suggestion for rehearing en banc. See Appendix G.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The final judgment against petitioners was based entirely on the Farm Labor Contractor Registration Act, 7 U.S.C. § 2041 *et seq.*, repealed and reenacted in substantially similar form effective April 14, 1983 by the Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. § 1801 *et seq.* The Farm Labor Contractor Registration Act appears at Appendix H hereof.

STATEMENT OF THE CASE

Background. Prior to 1977, growers in the Presidio Valley, a remote agricultural area on the Rio Grande River in Southwest Texas, had relied on undocumented workers from Mexico to harvest their crops, principally of onions and cantaloupes. In the spring of 1977, however, the Immigration and Naturalization Service ("INS") took steps to enforce the border and cut off the flow of Mexican harvest workers. Facing total loss of their already planted crops, the growers followed the suggestion of INS officials and applied for permission to bring in temporary foreign workers pursuant to the so-called H-2 program. The growers also followed the government's suggestion and formed the Presidio Valley Farmers Association to facilitate the paper work involved in the H-2 program. After much delay and the loss of much of the onion crop, the INS finally approved

the use of H-2 workers on June 9, 1977, in time to save the Presidio Valley cantaloupe harvest.

The Complaint. On July 11, 1977, 27 farm workers filed a class action against the Attorney General of the United States, the Immigration and Naturalization Service ("INS") and several Private Defendants: Griffin & Brand of McAllen, Inc. ("Griffin & Brand"), Othal Brand, Glen Martin, Presidio Valley Farms, Inc., Presidio Valley Farmers Association (the "Association"), and Bill Bishop.[1] Plaintiffs alleged that they had been recruited by defendant Glen Martin, an employee of Griffin & Brand, to harvest cantaloupes in Presidio, Texas beginning in June, 1977 but were subsequently denied employment after the INS authorized the temporary foreign workers (H-2 workers) to work in Presidio. The complaint alleged that the federal defendants had violated the Immigration and Nationality Act and that the Private Defendants had breached an employment agreement with plainitffs, violated the Farm Labor Contractor Registration Act ("FLCRA") and other statutes, and misrepresented job availability.

The Trial. On October 9, 1980, the district court issued an order which, without any explanation, certified a Rule 23(b)(2) class against the federal defendants and a Rule 23(b)(3) class against the Private Defendants. The certification order specifically excluded all crew leaders from the class but did not otherwise define the class. Trial was held in Brownsville, Texas on January 18-21, 1982 before District Judge James DeAnda.[2]

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[1] The original complaint named only Griffin & Brand as a Private Defendant. An amended complaint filed on March 20, 1978 added the other Private Defendants and added the cause of action based on the Farm Labor Contractor Registration Act.

[2] Three defendants (Othal Brand, Glen Martin and Bill Bishop), four crew leaders (Juanita Martinez, Florencio Camacho, Santiago Quintero, and Crispin Sanchez), and three crew members testified at the trial.

Presidio Valley Farms, Inc. was one of the Presidio Valley growers needing workers in 1977; the corporation was half-owned by its president Bill Bishop and half-owned by Griffin & Brand. Bill Bishop testified that in 1977 he contacted his co-owner, Othal Brand, chairman and owner of Griffin & Brand, and sought his assistance in obtaining harvest workers, just as he had done in previous years. (Unlike other Presidio growers, Bishop was able to obtain enough workers to harvest his onion crop before the H-2 workers were admitted.) In response to Bishop's request, Othal Brand instructed Glen Martin, an employee of Griffin & Brand, to notify farm labor contractors in McAllen, Texas that workers were needed in Presidio. Martin admitted contacting numerous crew leaders and informing them about the possibility of work in Presidio. Martin testified, however, that he informed the crew leaders that there was no housing available in Presidio, a fact which discouraged most crew leaders from going, and that he simply told the crew leaders to get in touch with the growers in Presidio. There was no evidence presented that Griffin & Brand received or was promised any fee for contacting the crew leaders.

The testimony of the four crew leaders and three alleged crew members was marked by numerous contradictions and inconsistencies. Crew Leader Juanita Martinez testified repeatedly that she and her crew of 50 were ready to leave for Presidio on June 9, 1977 when defendant Martin told her she was no longer needed in Presidio. Mrs. Martinez testified that, as a result, she and her crew were without work from June 1 until July 9 when she went to work harvesting melons for Griffin & Brand near Pecos, Texas. On cross-examination, however, Mrs. Martinez was confronted with payroll records signed by her and whose authenticity was not questioned that showed that Mrs. Martinez and her crew were working for Griffin & Brand in Mission, Texas from June 1 until June 19, 1977, including June 9, the day she and

her crew supposedly were ready to depart for Presidio.[3] Confronted with this contradictory and undisputed documentary evidence, Mrs. Martinez changed her testimony and stated that ". . . it might have been for the 9th of July and I made a mistake . . . I remember it was on the 9th. It must have been July. . . ." (The Presidio cantaloupe harvest would have been virtually over by July 9, 1977, and Mrs. Martinez actually went to work near Pecos, Texas on July 9, 1977.) Judge DeAnda remarked she had clearly impeached herself and that "this lady wasn't going to Presidio on June 9th, I don't suppose, if they were working down here." Nevertheless, with not one word of explanation, Judge DeAnda awarded Mrs. Martinez and her crew $94,000 in FLCRA damages.

The complaint alleged that crew leader Florencio Camacho was going to take a crew of 55 persons to Presidio. Camacho testified both at his deposition and at the trial that he was going to take was "about 53 or 54 workers."[4] Years later at the hearing on class claims, however, Camacho testified that he was going to take a group of 75 persons, 50 recruited by himself and another 25 recruited by Jose Flores, a claim he had never made before. Dissenting Circuit Judge Edith Jones characterized Camacho's testimony as "so utterly contradicted by his own earlier testimony and pleadings as to render it unbelievable." Appendix F, at 54a n.4. Although Camacho testified that he was ready to leave with his crew on June 14, his next door neighbor, plaintiff Roberto Blanco, testified that Camacho offered him a job only a

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[3] The payroll records also showed little correlation between the crew members working for Mrs. Martinez at the time and the crew she allegedly was taking to Presidio, contradicting her repeated testimony that she was going to take the same workers who had been working for her at the time.

[4] At the trial, plaintiffs introduced into evidence a list of 35 workers Camacho was going to take to Presidio. Camacho also testified he was going to take 12-15 others whose names he couldn't remember.

few days before the Fourth of July, when the Presidio harvest would have been nearly over. The complaint alleged that "there are three workers in the Camacho family," but Camacho claimed at the trial that eight family members were going to Presidio with him and, at the hearing on class claims, verified the claims of 10 Camacho family members.

"Crew leader" Jose Flores did not testify at the trial, nor did any member of his purported crew. Both the original complaint and the amended complaint identified Flores simply as an "unemployed migrant farmworker" who was part of Florencio Camacho's crew of 55 workers. Camacho identified Flores both at his deposition on January 29, 1979 and at the trial simply as a member of his crew. Only years later at the hearing on class claims did Camacho claim that Flores had recruited a crew of 25 workers on his behalf to go to Presidio, even though Flores admittedly was not even registered as a farm labor contractor.[5] Dissenting Circuit Judge Edith Jones would later state that "[t]he Flores crew does not appear to have existed at all until the hearing on damages. There was no evidence that Flores ever met with Martin and thus there was no basis for the district court to hold that the Flores 'crew' had any agreement with Martin." Appendix F, at 54a n.4. At his deposition, Flores admitted that he had never heard of Presidio and was told by Camacho about harvesting melons "here in the Valley." Flores was not even sure if the work was to start on the 15th of June or July. Flores' "crew" was awarded $54,000 in FLCRA damages.

Crew leader Santiago Quintero claimed that he was planning to take a crew of 25-26 workers to harvest cantaloupes in Presidio and that "the better part of

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[5] Had defendant Martin contacted Jose Flores directly, he would have been in violation of FLCRA for dealing with an unregistered farm labor contractor, making him liable for criminal and civil penalties. See 7 U.S.C. 2043(c).

them" were ready to leave on June 9. Although 12 of the persons he identified as part of his crew at the trial did not file claims, Quintero testified at the hearing on class claims that all 36 persons who filed claims were going wtih him to Presidio. Among the additional persons not identified previously were four with the last name "Quintero." Quintero also verified the claim of Jose Juan Martinez only to acknowledge later that the same person had submitted two claim forms, one using the false name of Jose Juan Martinez.

The Opinion. Judge DeAnda issued his Memorandum Opinion on liability issues on September 16, 1982. Judge DeAnda concluded that the federal defendants had violated the Immigration and Nationality Act by approving the visa petitions for the H-2 workers in 1977. Appendix B, at 14a. Judge DeAnda also held that defendant Glen Martin was a "farm labor contractor" by virtue of the salary he received from Griffin & Brand and that he had violated three provisions of FLCRA applicable to "farm labor contractors": (1) 7 U.S.C. § 2044(b)(2) (knowingly giving false or misleading information to migrant workers), (2) § 2045(b) (failing to disclose in writing to worker at time worker is recruited the terms and conditions of employment), and (3) § 2044(b)(4) (failure to comply with terms of working agreement). *Id.* at 15a-16a. Judge DeAnda further held that Griffin & Brand and the Association were "vicariously liable" for Martin's FLCRA violations. *Id.* at 16a. Judge DeAnda also ruled that Presidio Valley Farms, Inc. had violated FLCRA by engaging the services of an unregistered farm labor contractor, *i.e.*, the Association, to recruit the plaintiffs. *Id.* Judge DeAnda declared, without any further explanation, that each crew leader or crew member recruited by Martin was entitled to maximum liquidated FLCRA damages of $500 for each of the four FLCRA violations, a total of $2,000 per person, even though

actual damages would not have exceeded $500 per person even without taking mitigation into account. *Id.* at 17a.

A hearing on the class claims was held on December 6, 1984 before Magistrate Fidencio Garza, Jr., who filed a recommended decision allowing 159 claims and disallowing 44 claims. Judge DeAnda adopted in full the recommendations of Magistrate Garza. The final judgment exceeded $450,000, consisting of $318,000 in liquidated FLCRA damages, prejudgment interest of $75,000, and attorney's fees against the Private Defendants of $60,219.

The Appeal. Both the Private Defendants and the plaintiffs appealed to the Fifth Circuit, which issued its decision on November 5, 1986. The panel held that there was "no support in this record" for the district court's finding that Presidio Valley Farms, Inc. had violated FLCRA. Appendix F, at 38a. The court also reversed the district court's imposition of "vicarious liability" on the Association since the district court had made no specific findings concerning the Association's participation in Martin's FLCRA violations. *Id.* at 37a. The panel, however, remanded for a determination of whether the Association had "contributed to or had reason to know of Martin's misconduct" and also whether the Association had "independently" violated FLCRA, an issue that had not been raised on appeal. *Id.* at 37a. The court did uphold the imposition of "vicarious liability" on Griffin & Brand on the ground that, "[a]s Martin's employer, G&B was responsible for all of Martin's actions within the scope of his employment." *Id.* at 36a. The panel reversed the district court's award of prejudgment interest and attorney's fees against the Private Defendants but, with minor exceptions, dismissed all other arguments of the Private Defendants. In connection with the plaintiffs' cross-appeal, the panel ruled that the district court had improperly denied 44 claims. The Fifth Circuit ruled that, while it was acceptable to approve claims solely on the basis of crew leader testimony, it was not acceptable to deny claims on the basis of such testimony without

giving each claimant an opportunity to present his own testimony in support of his claim. *Id.* at 46a.

In dissent, Circuit Judge Edith Jones argued that the district court erred by failing to give any reasons for its "irresponsibly punitive" award of FLCRA damages and that the panel erred in remanding for reconsideration whether the Association had independently violated FLCRA in light of the plaintiffs' failure to raise the issue on appeal. *Id.* at 50a, 56a.

REASONS FOR GRANTING THE WRIT

I. The Reading of "Vicarious Liability" into the Farm Labor Contractor Registration Act Violated a Ruling of This Court by Giving a Reading to the Statute That Congress Had Specifically Considered and Specifically Rejected. The Decisions Below Also Conflict with a Decision of the Ninth Circuit.

Both the district court and the Fifth Circuit totally ignored the legislative history of FLCRA and imposed "vicarious liability" on Griffin & Brand for the alleged FLCRA violations of Glen Martin.[6] The district court held that defendant Martin was a "farm labor contractor" within the meaning of FLCRA by virtue of the salary he received from Griffin & Brand and that he violated three provisions of FLCRA applicable to "farm

[6] Petitioners also challenge the imposition of vicarious liability on defendant Martin for any FLCRA violations committed by the four registered farm labor contractors he dealt with. For example, none of the four crew leaders complied with his FLCRA obligation by giving his crew members a written statement of the terms and conditions of employment. Defendant Martin was held liable to all the crew members for this FLCRA violation even though he had no dealings with them and it was the crew leaders themselves who failed to comply with FLCRA. In the case of Jose Flores and his alleged crew, Martin was held liable to an unregistered farm labor contractor with whom he had no dealings. Martin, in fact, would have been in violation of FLCRA had he hired Flores directly since Flores was not a registered farm labor contractor.

labor contractors." The court then turned around and held Griffin & Brand "vicariously liable" for Martin's FLCRA violations, a theory of liability not even alleged in the complaint.[7] The district court imposed liability on Griffin & Brand even though it did not find that Griffin & Brand itself satisfied all the statutory requirements of a "farm labor contractor" or itself had violated FLCRA.[8] Although the Fifth Circuit acknowledged that the district court's Liability Order of September 16, 1982 "refers only generally to 'vicarious liability,'" it characterized the legal theory as "agency liability" and upheld the imposition of secondary liability on Griffin & Brand. Appendix F, 35a n.10.

Whether characterized as "vicarous liability" or "agency liability," the imposition of residual liability on Griffin & Brand gave a reading to the statute that Congress had specifically considered and specifically rejected, clearly violating Congressional intent. The reading of "vicarious liability" into the statute conflicts with this Court's holding in *Pacific Gas & Elec. v. Energy Resources Comm'n*, 461 U.S. 190, 220 (1983), that it is

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[7] The first mention of "vicarious liability" in the case came in the district court's Memorandum Opinion of September 16, 1982.

[8] This is not a case where the district court found Griffin & Brand acted as a farm labor contractor and was responsible for the actions of its employees. The district court found that Martin was the farm labor contractor and that Griffin & Brand was "vicariously liable" for his actions. The Fifth Circuit improperly attempted to repair the deficiency in the district court's decision by finding that Griffin & Brand received a "fee" for its services (*see* 7 U.S.C. § 2042(b)), an essential finding which the district court had avoided making and which finds no support in the record. In finding that Griffin & Brand received a "fee" for its services, the Fifth Circuit usurped the fact finding responsibility of the district court in clear violation of this Court's rulings that a court of appeals should not resolve in the first instance a factual dispute not considered by the district court. *See DeMarco v. United States*, 415 U.S. 449, 450 n. (1974); *Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1972).

". . . . improper . . . to give a reading to the Act that Congress considered and rejected."

When Congress amended FLCRA in 1974, it considered numerous proposals to impose "residual liability" or "vicarious liability" on various persons, such as "super crew leaders," anyone directing the activities of a farm labor contractor, those who utilized unregistered crew leaders, or simply anyone who utilized a farm labor contractor.[9] For example, the House of Representatives initially adopted a proposal, which was subsequently deleted, that sought to extend the prohibitions of FLCRA "to acts which any such contractor commits through agents acting on his own behalf." H.Rep. No. 93-1024, 93rd Cong., 2d Sess. 7 (1974). Similarly, the Senate adopted a proposal, which was subsequently deleted, to make certain persons liable for the FLCRA violations of *unregistered* farm labor contractors acting on their behalf. In the end, Congress rejected all proposals to extend liability for a farm labor contractor's violations beyond the farm labor contractor himself.[10] The adoption of a

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[9] See 120 Cong. Rec. 13407, 35468-471, 37373-376 (May 7, October 11, November 26, 1974); H.Rep. No. 93-1024, 93rd Cong., 2d Sess. 7-8 (1974); S.Rep. No. 93-1206, 93rd Cong., 2d Sess. 9, 18 (1974).

[10] During final consideration of the 1974 FLCRA amendments, Rep. Quie emphasized that "[w]e have imposed on those with whom a crew leader deals the obligation to first determine that the crew leader possess a certificate and to keep records . . . Although these growers and processors may be liable for their failure to observe those two requirements, it is my understanding that there is no residual responsibility in them for the crew leader's abuses and failures." 120 Cong. Rec. 37376 (1974). *See also Benavides v. Salazar*, No. P-83-CA-27 (W.D.Tex., Pecos Div., July 13, 1984) (per Circuit Judge Thomas Gibbs Gee, sitting by designation), *aff'd*, No. 84-1819 (5th Cir., decided October 7, 1985) (unpublished) (". . . the imposition of vicarious liability was specifically taken up and specifically rejected by Congress when it amended FLCRA in 1974." Slip Opinion, at 11-12.).

legal theory rejected by Congress amounts to judicial legislation which usurps the responsibility of Congress in writing the nation's laws.

The Fifth Circuit's decision upholding "vicarous liability" also conflicts with a Ninth Circuit decision that rejected a similar attempt to impose indirect liability on an employer through the actions of its employees where the employer had not directly violated the Act itself. In *Marshall v. Green Goddess Avocado Corp.*, 615 F.2d 851, 856 n. 11 (9th Cir. 1980), the Ninth Circuit held that "[e]ven if Green Goddess employees who engage in hiring were characterized as independent third parties, they, and not the corporation, would be 'farm labor contractors' subject to the FLCRA's requirements. . . Employee-agents, as intermediaries, would occupy a position similar to that of the growers' associations, and Green Goddess, which utilizes their services, would be the functional equivalent of the individual farmers in that case." [11]

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[11] The Fifth Circuit itself has recognized in other cases that the imposition of "vicarious liability" was not consistent with FLCRA's structure. In *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1333-34 (5th Cir. 1985), and *Presidio Valley Farmers Association v. Brock*, 765 F.2d 1353, 1357 (5th Cir. 1985), *cert. denied*, —— U.S. —— (1986), the Fifth Circuit held that FLCRA precluded the imposition of vicarious liability. In *Beliz*, the Fifth Circuit specifically rejected agency relationship as a basis for imposing liability on another for a farm labor contractor's FLCRA violations. The Fifth Circuit attempted to distinguish these cases on the grounds that they involved "farmer-users," a term that is not found in FLCRA and is wholly an invention of the Fifth Circuit. Apart from "farm labor contractors," FLCRA imposed duties on any "person [who] shall engage the services of a farm labor contractor" (7 U.S.C. § 2043(c)) and "any person who is furnished any migrant worker by a farm labor contractor" (7 U.S.C. § 2050c). The statute does not support the Fifth Circuit's distinction between "farmer-users" and any other persons who engage the services of a farm labor contractor.

II. The Unexplained Award of Punitive Liquidated FLCRA Damages Greatly in Excess of Any Ascertainable Actual Damages Conflicts with the Decisions of Other Circuit Courts.

The Fifth Circuit's decision affirming the district court's unexplained award of punitive FLCRA damages greatly in excess of any ascertainable actual damages [12] conflicts with the decisions of other circuit courts.

Without one word of explanation, the district court awarded maximum liquidated FLCRA damages of $500 for each of four FLCRA violations (three technical and one substantive), a total of $2,000 to each class member, resulting in a total judgment in excess of $450,000 at the date of entry in May, 1985.[13] The Fifth Circuit acknowledged that "[i]n fixing the amount of the award, the court should consider numerous factors" but concluded that "the [district] court carefully considered these factors," although it cited no place in the record where the court did so.[14] Appendix F, at 39a. Circuit Judge Edith

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[12] The Fifth Circuit acknowledged that the plaintiffs "made no real attempt to prove actual damages . . . but instead requested only liquidated damages—in an amount which no one argues is related to the actual damages suffered." Appendix F, at 48a. Dissenting Circuit Judge Jones noted that, "[b]y appellees' own admission, the actual damages suffered by each class member could not have exceeded $500 . . . Moreover, the record establishes that many if not most class members mitigated damages by working for Defendant Griffin & Brand when the Presidio employment prospect vanished." Appendix F, at 52a.

[13] The Fifth Circuit vacated part of the judgment by reversing the district court's award of attorney's fees, prejudgment interest, and the FLCRA violation against Presidio Valley Farms, Inc., but, on remand, the district court could increase the judgment again by reinstating the attorney's fees, awarding damages to the 44 claimants previously denied, and finding additional independent FLCRA violations by the Association.

[14] The Fifth Circuit in *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332 (5th Cir. 1985), held that several factors should be considered in awarding FLCRA liquidated damages, in-

Jones vigorously dissented, declaring that ". . . the district court's award here has no articulated basis. Perhaps that is because, tested by awards in other cases, it defies justification . . . for all that we know from the record, the court may have made his award because he disliked the defendants or their counsel." *Id.* at 55a. Judge Jones, who characterized the damage award as "irresponsibly punitive," and "by far the largest judgment ever awarded against farm labor contractors for violating FLCRA," declared that "[t]he standards used by this Court to test FLCRA awards, a comparison of awards in other cases FLCRA violations, and the context of defendants' violations all overwhelmingly indicate that the district court exceeded the bounds of reason in its award of damages." *Id.* at 50a, 56a.[15]

The punitive damage award in this case conflicts with the decisions of other circuit courts which hold that liquidated damages awarded under FLCRA are supposed to be compensatory in nature and not punitive. In *Rivera v. Anaya*, 726 F.2d 564, 569 (9th Cir. 1984), the Ninth

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cluding "not only the amount allowed to each plaintiff for each violation but also the total amount of the award" as well as the "substantive or technical nature of the violations." *See also Salazar-Calderon v. Presidio Valley Farmers Association*, 765 F.2d 1334, 1347 (5th Cir. 1985) (refusing to upset FLCRA damage award where "the district court supported its decision with factors that could properly be considered by it").

[15] Judge Jones noted that Presidio Valley Farms, Inc. was held liable to each plaintiff for $500 for using the Association, an unregistered farm labor contractor. According to Judge Jones, "[h]ow plaintiffs were harmed by this violation is not known, and indeed, we have found no legal basis to sustain this award. It is interesting to note that in *Salazar-Calderon* [*v. Presidio Valley Farmers Association*], PVFA's failure to register as a FLCRA contractor was termed a technical violation that gave rise to liquidated damages of $15 per plaintiff. Yet a nearly-identical violation was penalized at a rate 33 times higher by the district court in this case." Appendix F, at 55a n.6.

Circuit held that the fact that Congress permitted an award of actual or statutory damages under FLCRA "in no way detracts from the fact that the provision for damages contemplates 'compensation, not a penalty or punishment by the Government.'" The Ninth Circuit emphasized that FLCRA is "remedial in nature." *Id.* *See also Alvarez v. Longboy*, 697 F.2d 1333, 1340 (9th Cir. 1983) ("Section 2050a is remedial, and awards under it are therefore appropriately tied to the number of injured workers. Construing the Act to allow the district court to award less than $500 adequately insures against disproportionately large awards when the number of migrant workers is large.")

Similarly, the Seventh Circuit in *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225 (7th Cir. 1983), upheld an award of liquidated damages where "[be]cause of the difficulty of quantifying the monetary impact of these [FLCRA] violations, and because of the importance of enforcing strict compliance with FLCRA, the district court attempted to determine an amount of liquidated damages which it thought would 'fairly and equitably' compensate the workers for the defendants" actions. The Seventh Circuit stressed that "these damages were not 'punitive.'" *See also Lopez v. Brugel*, 567 F. Supp. 316 (N.D. Tex. 1983), where the court stated that "[t]he FLCRA was never intended to act as a device through which courts might award punitive damages for violations thereunder. . . Each Plaintiff in this case is entitled to receive an amount which could fairly and equitably compensate him or her for Defendant's statutory violations." The district court observed that "Plaintiffs' actual damages suffered, if proven, would not have reached the level of $500.00 per Plaintiff per violation of the FLCRA by Defendant," and awarded $200 to each plaintiff.

III. The Certification of a 23(b)(3) Class Action Based Entirely on Alleged Oral Misrepresentations Conflicts with the Overwhelming Weight of Authority, and the Subsequent Handling of the 23(b)(3) Class Action Conflicts with the Decisions of Other Circuits.

Without one word of explanation, the district court certified this action as a Rule 23(b)(3) class action against the Private Defendants even though the case involved essentially a contractual dispute and was based entirely on alleged oral misrepresentations purportedly made at different times to many different persons. The certification of the (b)(3) class and the subsequent handling of the class action was contrary to the overwhelming weight of authority.

A. *The Certification of a 23(b)(3) Class Action Based Entirely on Alleged Oral Misrepresentations Conflicts with the Overwhelming Weight of Authority.*

While conceding that "claims [which] arise out of alleged oral misrepresentations . . . have been found unsuitable for class treatment when individual questions such as reliance and damages predominate over class questions," Appendix F, at 40a, the Fifth Circuit affirmed the district court's certification of the 23(b)(3) class action. Its decision conflicts with the overwhelming weight of authority holding that class certification is not proper where oral misrepresentations constitute the heart of the case. *See, e.g., Crasto v. Estate of Kaskel*, 63 F.R.D. 18, 23 (S.D.N.Y. 1974) ("Oral misrepresentations, by their very nature, differ from person to person, especially where, as here, they are made by and to different people. Thus, at trial, in order to prove that the representations were made, plaintiffs would have to call each class member who was allegedly deceived by oral representations."); *Blumenthal v. Great American Mortgage Investors*, 74 F.R.D. 508, 511-12 (N.D.Ga. 1976)

("As a general rule purported class actions based on oral rather than written misrepresentations may not be maintained as class actions.").[16]

This action was essentially based on contract.[17] Not only did the complaint contain a claim based on breach of contract, but the statutory violations found by the district court were essentially contractual in nature, *e.g.*, failure to comply with the terms of the working agreement (7 U.S.C. § 2044(b)(4)). In order to prove these allegations with respect to each class member, it would have been necessary to determine whether each class member was actually recruited to go to Presidio, what he was actually told about the terms and conditions of

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[16] *See also Goldstein v. Royal Crest, Inc.*, 59 F.R.D. 396, 401-02 (E.D.Pa. 1973); *Ingenito v. Bermac Corporation*, 376 F.Supp. 1154, 1167 (S.D.N.Y. 1974) ("It is precisely because of the difficulties thus presented that the view that oral misrepresentations and omissions are not suited for class treatment finds strong support in the authorities."); *Stevens v. Woodstock, Inc.*, 372 F.Supp. 654, 656 (N.D.Ill. 1974); *Reichert v. Bio-Medicus, Inc.*, 70 F.R.D. 71, 76-77 (D.Minn. 1974); *McHan v. Granbouche*, 99 F.R.D. 260, 266 (D.Kan. 1983); *Mulcahey v. Petrofunds, Inc.*, 79 F.R.D. 272, 278 (S.D.Tex. 1978); *Reilly v. Frederick*, 21 F.R. Serv.2d 163 (N.D.Ala. 1976). The Fifth Circuit has held that class certification is not proper where oral misrepresentations form the essence of the case. *See, e.g., Simon v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 482 F.2d 880, 882 (5th Cir. 1973); *Grainger v. State Security Life Insurance Company*, 547 F.2d 303, 307 (5th Cir. 1977).

[17] The district court recognized the contractual nature of the complainant when it awarded plaintiffs attorneys' fees based on a Texas statute allowing recovery of attorney's fees in suits founded on oral or written contracts. In its Memorandum and Order of May 2, 1985, the district court stated that ". . . the Farm Labor Contractor Registration Act provides for the disclosure of the terms and conditions of employment which, if accepted, constitute a binding contract . . . The Plaintiffs prevailed . . . on three claims brought under the F.L.C.R.A. . . . These claims directly pertain to the initiation, conditions and breach of the employment contracts at issue."

employment in Presidio, whether he actually had formed an intention to go to Presidio, and whether he was in a position to go to Presidio. The individual nature of these determinations was recognized by the district court at the hearing on class certification when the presiding judge asked plaintiffs' counsel whether ". . . every recovery would be contingent on the individual person, being able to show that in fact they had a contract and they had accepted employment?" to which plaintiffs' counsel answered "yes." [R.Vol.8:7-8.] The district court failed to explain why certification was proper in this case in light of the essentially individual nature of these determinations.

Since the case was handled as a class action, the Private Defendants were deprived of the opportunity to depose or cross-examine the vast majority of class claimants. The result was that, as the Fifth Circuit stated, "[b]eyond the information on the claims forms, we know nothing about most of the [claimants]." Appendix F, at 46a. The testimony of the few plaintiffs and class claimants who either testified or were deposed revealed substantial variations and inconsistencies which confirmed the impropriety of class certification. Florencio Camacho's testimony that he was ready to leave for Presidio on June 14, 1977, was contradicted by that of his next door neighbor, Roberto Blanco, who testified that Camacho first told him about the Presidio job a few days before the Fourth of July.[18] "Crew leader" Jose Flores claimed that Camacho asked him to recruit a crew, but he stated at his deposition that he had never heard of Presidio and was told about harvesting melons "here in the Valley."

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[18] The few class claimants the district court permitted Private Defendants to depose showed similar discrepancies in testimony. James Medrano testified that he was approached in March, 1977 with departure in April, 1977. Daniel Ortiz testified that Crispin Sanchez offered him work in March, 1977 with departure in April, 1977.

Crew leader Juanita Martinez testified at first that she was leaving for Presidio on June 9, then changed her story to say she was leaving on July 9.[19] Crew leader Quintero testified at the trial that he was taking a crew of 23-24 workers, then verified 36 claims at the hearing on class claims, including a claim he later admitted was false. The uncertainty of the plaintiffs' claims made it necessary to test the validity of their claims through cross-examination and thus rendered class certification wholly inappropriate.

The Fifth Circuit confirmed the problems inherent in certifying the 23(b)(3) class when it reversed the district court's disallowance of 44 class claims on the basis of crew leader testimony alone. The Fifth Circuit held that, while it was acceptable to approve claims solely on the basis of crew leader testimony, "no self-proclaimed crew member should be excluded from the class without being given an opportunity to substantiate his claim." Appendix F, at 46a. Thus, we have the ludicrous situation where the district court was permitted to rely on the unsubstantiated testimony of a crew leader in awarding $2,000 to claimants but could not rely simply on that testimony in deciding not to award $2,000 to claimants.[20]

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[19] Undisputed documentary evidence, payroll records signed by Mrs. Martinez, completely undermined her testimony on three key points and caused the district court to remark that shs had impeached herself. The Fifth Circuit's affirmance of the district court's unexplained decision to credit Mrs. Martinez' testimony in the face of undisputed documentary evidence conflicts with this Court's decision in *United States v. Gypsum Co.*, 333 U.S. 364, 396 (1948) ("Where such testimony is in conflict with contemporaneous documents we can give it little weight. . . . ").

[20] Nothing better illustrates the absurdity of the situation than the case of "crew leader" Jose Flores, who was identified in the complaint simply as a migrant worker but later claimed that he recruited a crew of 25-30 workers. Forty-four persons filed claims contending that they were part of his crew, but he testified that he only recruited 27 of them. Nonetheless, the Fifth Circuit now

The fact that such individual testimony is deemed necessary before a claim can be disallowed constitutes a recognition that class certification is inappropriate in a case like this.

B. *The Fifth Circuit's Failure to Require the District Court to Make the Findings Demanded by Fed.R. Civ.P. 23 and to Give Reasons for Certification of the 23(b)(3) Class Action Conflicts with the Decisions of Other Circuits.*

The district court made none of the necessary findings required by Rule 23 and failed to address the issues presented by Rule 23 as well as the substantive objections to class action posed by the Private Defendants.[21] The Fifth Circuit agreed "that more detail would be preferable and, were the order all we had, [we] might have remanded for greater specificity." Appendix F, at 40a n.15. The Fifth Circuit found that the district court considered the Rule 23(b)(3) factors based on "the parties' briefs, other orders and the trial record as well as transcripts of the numerous hearings," but it cited no place in the record where the district court set forth its reasons justifying class certification. The Fifth Circuit's indulgent attitude toward the district court's duty to make the necessary findings required by Rule 23 conflicts with the much more stringent position taken by other circuit courts. In *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1313 (4th Cir. 1978), the Fourth Circuit held that, in certifying a class action, ". . . the court must make specific

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requires the district court to hold additional hearing to take the testimony of the 17 claimants whose claims were disallowed.

[21] In order for a Rule 23(b)(3) class action to be maintained, the four requirements of Rule 23(a) must be met, and, in addition, the district court must "find" that "the questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(a), (b)(3).

findings establishing that the case satisfies the several requirements for certification." The Ninth Circuit has taken the same position. *See Price v. Lucky Stores, Inc.*, 501 F.2d 1177, 1179 (9th Cir. 1974) (". . . a trial court, in determining whether or not the case should proceed should make certain findings as to the Rule's provisions and their application to the case at bar."). The district court's failure to ascertain which class members could be identified through reasonable efforts also conflicts with the Second Circuit's decision in *In re Franklin National Bank Securities Litigation*, 599 F.2d 1109, 1110 (2d Cir. 1978) (to "direct to the members of the class the best notice practicable under the circumstances" as required by Rule 23(c)(2) "requires a finding on the subject of the 'members who can be identified through reasonable effort.' . . .").

C. *The Inclusion of New Class Members after the Decision on the Merits and the Expiration of the Statute of Limitations Violates the Express Terms of Fed.R.Civ.P. 23(c)(1), Conflicts with the Decisions of Other Circuits, and Is Inconsistent with This Court's Ruling in American Pipe & Construction Co. v. Utah.*

The class certification order of October 9, 1980 specifically excluded all crew leaders from the 23(b)(3) class.[22] Also excluded from the class were all illegal aliens.[23] According to the Fifth Circuit, "[t]he class, as

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[22] Crew leaders Martinez and Quintero were specifically excluded from the class, were not named as plaintiffs in the complaint, and never intervened in the case. When Private Defendants objected to their receiving an award of damages, the district court initially ruled that they were part of the class, despite their exclusion by the certification order, but later ruled that they had been joined as plaintiffs in the action in conformance with the evidence, even though the court had referred to them as non-party witnesses in its Memorandum Order of September 16, 1982. Appendix B, at 7a.

[23] Although the certification order did not define the class, illegal aliens had been excluded by the class proposed in the complaint,

originally certified, did exclude crew leaders and consist only of 'domestic farm workers,' . . . [but] by final judgment, the class included each of the four crew leaders and all recruited crew members regardless of immigration status." Appendix F, at 43a. Despite the absence of any ruling by the district court,[24] the Fifth Circuit ruled that the class had been expanded to include illegal aliens and crew leaders and that the expansion of the class was not an abuse of discretion. *Id.*

The alteration of the class after the district court had already rendered its decision on the merits and determined the amount of damages each class member would receive violated the express terms of Fed.R.Civ.P. 23(c)(1) and conflicts with decisions of the other circuits. Fed.R.Civ.P. 23(c)(1) specifically provides that "[a]n order . . . may be conditional, and may be altered or amended *before the decision on the merits.*" (Emphasis added.) *See also Peritz v. Liberty Loan Corporation*, 523 F.2d 349, 353 (7th Cir. 1975) (". . . Rule 23 requires class certification prior to a determination on the merit."); *Equal Employment Op. Com'n v. Detroit Edison Co.*, 515 F.2d 301, 310 (6th Cir. 1975) (". . . where the court enters an order which has the effect of defining a class and parties proceed to trial on the basis of such determination, the court may not, consistent with fairness or with the provisions of Rule 23(c)(1), amend the definition at the time of its decision on the merits.").

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amended complaint, and motion for class certification. The district court "barred inquiry into the immigration status of" the class claimants. Appendix F, at 43a n.17. The immigration status of the class claimants was crucial since the registered farm labor contractors Martin dealt with had an affirmative obligation to make inquiry of the legal status of prospective crew members and were prohibited from hiring illegal aliens. 7 U.S.C. § 2045(f); 29 C.F.R. § 40.51(p) (1977).

[24] In fact, the final judgment limited the class to "all domestic workers who did reside in the South and Southwest." Appendix C, at 18a.

The belated expansion of the class is also inconsistent with this Court's ruling in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 547 (1974) (". . . the 1966 Amendments were designed, in part . . . to assure that members of the class would be identified before trial on the merits. . . .").

Moreover, the Fifth Circuit's expansion of the class to include persons previously excluded by the certification order totally ignored the statute of limitations and thus revived claims that were already time-barred.[25] The Fifth Circuit's decision conflicts with decisions of other circuit courts holding that class certification does not revive claims already barred. *See Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 472 (D.C.Cir. 1976); *Escott v. Barchris Construction Corporation*, 340 F.2d 731, 733 n.3 (2d Cir. 1965).

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[25] The applicable statute of limitations for FLCRA causes of action in Texas at the time was two years. *See Salazar-Calderon v. Presidio Valley Farmers Association*, 765 F.2d 1334, 1351 (5th Cir. 1985). Any tolling of the statute of limitations would have ceased when the district court issued its certification order of October 9, 1980 excluding the crew leaders and illegal aliens. *See American Pipe & Construction Co. v. Utah, supra.* Since illegal aliens were not included in the class defined in the original and amended complaint, there could have been no tolling of the statute with respect to them. The district court attempted to redefine the class to include the previously excluded crew leaders at the hearing on May 2, 1983, more than two years after they were excluded. By that time, their claims were barred by the two-year statute of limitations. It is not clear from the record when the district court expanded the class to include illegal aliens, who, in fact, were excluded from the class in the final judgment. The Fifth Circuit cited no place in the record where the court did so and, in fact, directed the district court to amend the judgment, on remand, "to reflect the precise final definition of the class." Appendix F, at 44a.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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March 17, 1987

APPENDICES

APPENDIX A

Order of October 9, 1980 Granting Class Certification

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

C.A. No. 77B167

ANTONIA MONTELONGO, *et al.*,
Plaintiff

vs.

GRIFFIN BELL, *et al.*,
Defendants

ORDER GRANTING CLASS ACTION
CERTIFICATION

On this the 9th day of October, 1980, the Court having considered the Plaintiffs' Motion for Class Action Certification under Rule 23(b)(2) and (3) and having considered the memoranda in support thereof and in opposition thereto, is of the opinion that said motion should be GRANTED, in part.

It is well recognized under Rule 23 that the Court has discretion to regulate the conduct of the litigation and that ". . . (t)o the extent that Rule 23 implements the class action as a unique litigation device, that discretion may be correspondingly broadened, and we (the Fifth Circuit) recognize broad management powers of the Court under Rule 23." *Bernard v. Gulf Oil*, 619 F.2d

459 at 475 (5th Cir. 1980). Pursuant to these powers this Court finds that the Plaintiffs Florencio Camacho and Crispin Sanchez, as crewleaders have interests which are potentially conflicting with the 23(b)(3) class which Plaintiffs seek to certify. Class members whose interests are antagonistic or potentially conflicting with the interests of the class should not be certified as part of the class. *Phillips v. Klessen*, 502 F.2d 362 (D.C. Cir. 1974); See *Baily v. Ryan Stevedoring Company, Inc.*, 528 F.2d 551 (5th Cir. 1976). Accordingly, Florencio Camacho and Crispin Sanchez are removed from the 23(b)(2) class, and they as well as all the crewleaders are removed from the 23(b)(2) class. Florencio Camacho and Crispin Sanchez may continue pursuing their claims individually in this case.

It is hereby ORDERED that the 23(b)(2) and (3) classes be certified as modified by the Court.

SIGNED FOR ENTRY on this the 9th day of October, 1980.

/s/ Filemon B. Vela
FILEMON B. VELA
United States District Judge

APPENDIX B

Memorandum Opinion of September 16, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action Number B-77-167

ANTONIA, MAGDALENA, and CLEMENTE MONTELONGO, ROBERTO, CAROLINA, ANGELITA and LAURA BLANCO, JOSE, MARIA, and LUCINDA FLORES, LUCIA and BLANCA PEREZ, JESUS and HERMINIA LONGORIA, MODESTO and MARGARITA BERLANGA, VICENTE and LUPE BARRAZA, VICTORIANO and NORMA GONZALES, JUAN PABLO and MARIA ELENA GONZALES, RODRIGO CARDOSA, PORFIRIO PEREZ, ERASMO MIRELES, CRUS and ANSELMA RAMIREZ, on behalf of themselves and others similarly situated,

vs.

GRIFFIN BELL, Attorney General of the United States, LEONEL CASTILLO, Commissioner, Immigration and Naturalization Service, MARIO T. NOTO, Deputy Commissioner of the Immigration and Naturalization Service, Indiivdually and in their official capacities, and GLEN MARTIN, BILL BISHOP, OTHAL BRAND, PRESIDIO VALLEY FARMS, INC., PRESIDIO VALLEY FARMERS ASSOCIATION, and GRIFFIN AND BRAND OF MCALLEN, TEXAS, INC.

Texas Rural Legal Aid, Inc. (James A. Herrmann) of Harlingen, Texas, and Texas Rural Legal Aid, Inc., Farm Worker Division (Edward J. Tuddenham) of Hereford, Texas, for Plaintiffs.

Daniel K. Hedges, United States Attorney and Jim C. Ezer, Assistant United States Attorney of Houston, Texas, for Federal Defendants.

Jones, Lewis & Pettitt (J. Perry Jones) of McAllen, Texas, for Private Defendants.

MEMORANDUM OPINION

This case concerns the events surrounding the 1977 approval of visas for hundreds of Mexican farm workers to work in the Texas Presidio Valley. From the trial held in this case the following factual findings and legal conclusions are reached pursuant to Rule 52, FED. R. CIV. P.

FINDINGS OF FACT

1. The Plaintiffs are United States citizens or resident alien migrant and seasonal farm workers and crew leaders whose permanent residence is in the Rio Grande Valley of South Texas.

2. The Defendants Griffin Bell, Leonel Castillo and Mario T. Noto in 1977 were, respectively, the attorney General of the United States, the Commissioner of the Immigration and Naturalization Service (hereafter "INS"), and the Deputy Commissioner of the INS.

3. The Defendant Presidio Valley Farms, Inc. (hereafter "PVF") is a Texas Corporation which in 1977 was engaged in the production of onions, cantaloupes, peppers and cotton on approximately twelve hundred acres it owned or leased in Texas' Presidio Valley. Half of PVF is owned by the Defendant Griffin and Brand of McAllen, Texas (hereafter "Griffin and Brand"), and half is owned by the Defendant Billy Joe Bishop who was

the President of PVF in 1977. Griffin and Brand is a corporation engaged in the production and sale of agricultural produce in the Rio Grande Valley and elsewhere in Texas. In 1977, in addition to its interest in PVF, Griffin and Brand had sales contracts with other Presidio Valley and Redford growers and had invested in the Redford Valley. In 1977 the Defendant Othal Brand was the chairman of the board of Griffin and Brand. The Defendant Presidio Valley Farmers Association (hereafter "Association") when formed in 1977 was an unincorporated association of Presidio and Redford Valley farmers organized in substantial part for the purpose of acquiring agricultural labor for the member farmers, who paid membership fees of one dollar per acre. PVF was a member of the Association from its inception and Billy Joe Bishop was the Association's first President. The Defendant Glen Martin is an employee of Griffin and Brand responsible for the provision of labor for Griffin and Brand's harvest of approximately ten thousand acres. He inspects the crops, estimates the labor which will be needed for their production, and recruits field laborers primarily through crew leaders.

4. In 1977 Griffin and Brand was registered as a farm labor contractor and Glen Martin was registered as an employee of a farm labor contractor. In 1977 the Association, Billy Joe Bishop, and PVF were not registered as farm labor contractors nor as employees of farm labor contractors.

5. That portion of the Presidio Valley on the United States side of the Rio Grande consists of approximately five thousand acres and is hundreds of miles from any U.S. city of even moderate size. Just over a thousand people live in the town of Presidio which is across the river from the Mexican City of Ojinaga where approximately thirty thousand people live. The production of the U.S. crops periodically requires hundreds of laborers.

For years prior to 1977 this need was met primarily with undocumented Mexican nationals who resided in Ojinaga and crossed the river illegally each day to work. Although the work force also consisted of some documented aliens and domestic crews (local and occasionally migrant), the large supply of poor Mexican workers allowed depressed wages and working conditions to prevail.

6. In late March, 1977 the INS notified the Presidio growers of its decision to enforce the border in the Presidio Valley, thereby ending the flow of undocumented Mexican workers. At this time the growers were given information about how to enable the same workers to cross the border legally by securing visas for them. In pursuit of the visas some of the farmers went to the Texas Employment Commission (hereafter "TEC") offices in Pecos and in Austin, and to the Department of Labor (hereafter "DoL") office in Dallas. In these meetings the farmers became aware of the details of the procedure for obtaining visas for "nonimmigrant" foreign laborers.

7. The visa procedure manifests a general policy of protection of the domestic worker. One prerequisite to approval of a petition for foreign workers is that there be no avaialble domestic workers who would be displaced. "Availability" of domestic workers is determined under the regulatory scheme with respect to specified work terms, one of which is the provision of housing by the employer. This requirement presented a major problem for the Presidio growers since most of the laborers in the past had lived in their permanent homes in Ojinaga or in the valley on the U.S. side. Although there was some housing for migrant workers on some of the farms, there certainly was not enough for the hundreds of workers that were needed. The limited facilities in the town of Presidio which might have been used were increasingly occupied throughout the Spring of 1977 by the extra contingent of Border Patrol Officers and by others working on a federal levee construction project.

8. Aside from Billy Joe Bishop's application to the FHA for assistance in constructing housing, there was no evidence that any efforts were made to secure available housing or to create additional housing during April and May, nor was there evidence that additional housing could have been provided in that time.

9. After DoL personnel in Dallas explained that DoL could not test the availability of U.S. workers under its regulations because the Presidio growers could not meet the specified work terms, the Association was formed. On the advice of the INS Senior Officer in Presidio the Association petitioned for foreign worker visas directly to the INS in El Paso.

10. After investigating the Presidio situation the head of the El Paso office granted the petitions. Because the approval had been granted without certification from the DoL, it was automatically reviewed by the INS Regional Director in Dallas. He reversed the decision on April 26, 1977 because the petitioners had failed to present countervailing evidence sufficient to overcome DoL's refusal to certify and he concluded, therefore, that approval of the visas would adversely affect domestic workers.

11. While pursuing reinstatement of the original approval, the Association increased its efforts to recruit domestic workers. Billy Joe Bishop hired a few domestic crews for the May onion harvest who had worked at PVF previously. Bishop kept Othal Brand informed of the labor situation and requested that he use Griffin and Brand's resources to recruit workers for the Association's members. Brand instructed Glen Martin to get workers for Presidio and Martin began to recruit in the Rio Grande Valley. In late May and early June several Rio Grande Valley crew leaders, including the Plaintiffs Crispin Sanchez and Florencio Camacho and trial witnesses Santiago Quintero and Juanita Martinez, discussed the Presidio work with Glen Martin. Martin told them they were needed to harvest melons for five to six weeks,

that there was enough work for them to work seven-day-weeks and eight-to-ten-hour-days, and that they would be paid $2.50 per hour, a crew leader commission of $.26 per worker per hour, and $6.00 per ton of melons hauled if they had trucks. The number of hours of work quoted was neither intended nor interpreted as a guarantee. Martin also told the crew leaders that housing would be made available for the crews when they arrived in Presidio. None of the crew leaders would have agreed to assemble and take crews if they had been told there was no housing available in the United States. However, in the event the visas were never approved, the growers were sufficiently desparate to gamble that some crews would accept Ojinaga housing rather than turn back once they had gone all the way to Presidio. None of the crew leaders were given a written statement of the terms and conditions of the Presidio employment by Glen Martin or anyone else. Several crew leaders including those listed above agreed to take crews to Presidio. Martin noted the anticipated size of each crew and instructed the crew leaders to stay in contact with him for departure instructions.

12. During May, 1977 the Presidio visa situation reached the Director of INS, Leonel Castillo. He sent two investigators to Presidio to review the problem and advise him. Upon their arrival in early June an Association meeting was held and attended by the INS representatives and officials from the TEC office in Pecos. The INS representatives toured the Presidio and Redford areas examining the corps and need for workers.

13. At the time of this field investigation a Washington meeting of INS and DoL officials was held, and DoL agreed to send representatives to Presidio to explore further the possibility of DoL certification. A second Association meeting was held on June 6 with the DoL and TEC representatives. The officials proposed that domestic workers be sought pursuant to the regulations in the limited numbers which could be housed in Presidio,

and that DoL then certify the visa petition for the balance of workers needed. The Association rejected this proposal because the growers did not want to offer the DoL specified terms, which included the hourly wage of $2.83, to domestic workers with no guarantee that entry of the foreign workers would be approved. Various growers also did not accept the authenticity of the DoL's non-adverse effect wage of $2.83, although no evidence of any formal challenge was presented. The DoL representatives were unable to establish the authority for the non-adverse effect wage to the growers' satisfaction, and the Association did not accept that the non-adverse effect work terms would have to be given to the foreign workers.

14. With DoL certification still not possible, the Washington INS officials considered their representatives' field report and Mario Noto, the Deputy Commissioner of INS to whom Commissioner Castillo had delegated the matter, approved the petitions on June 9, 1977 (thereby negating the Regional Director's reversal). Billy Joe Bishop was notified of the approval that evening by telephone, and the Mexican workers began to cross the border with the visas on June 10, 1977. They did not receive many of the non-adverse effect work terms.

15. By the middle of the following week the Plaintiffs knew they were no longer wanted in Presidio. The crew leaders who testified (Camacho, Sanchez, Quintero and Martinez) all had contacted Glen Martin as they had been instructed and each had assembled a crew that was ready to leave for Presidio. Crispin Sanchez had advanced $400 to various crew members which he lost when the Presidio work "fell through." Santiago Quintero similarly lost $400 in crew advances, and Juanita Martinez, $2,000. By that time those who had planned to go to Presidio had a very difficult time finding alternative work in the Rio Grande Valley.

VISA-RELATED CLAIMS

The Plaintiffs claim that the application and approval of the visa petitions violated the Immigration and Nationality Act, 8 U.S.C.A. § 1101 *et seq.*, specifically sections 1101(a)(15)(H)(ii) and 1184(c), to the Plaintiffs' detriment, and that they may seek remedies for the violation directly under the Act and under the Administrative Procedure Act, 5 U.S.C.A. § 551 *et seq.* and § 107 *et seq.* The parties have argued extensively whether a private right to bring this action should be recognized under the Immigration and Nationality Act. Although the Plaintiffs' arguments and authorities are persuasive, decision of this issue is unnecessary.

The only remedy sought with respect to the visas which is not otherwise available under the Administrative Procedure Act is that of damages from the private Defendants. Even if the private right of action were recognized, however, the private Defendants would not be liable in damages for their application for the visas. The remedy for their inadequate application was rejection by the INS. Since the INS approved the visas, the private applicants are not liable for persuading the officials to exercise their discretion in the applicants' interests. This is not a matter of vicarious immunity, but simply that an insufficient applications does not "violate" the Act.

After a petition is approved affirmative obligations do arise for which an employer should be liable despite failures of the INS to enforce the Act. *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 50 U.S.L.W. 5035 (1982). Certainly an employer is responsible to the nonimmigrants for the work terms in the visa petitions, and similarly to domestic workers actually hired. With respect to those not hired, in the normal case in which DoL has certified, the employer has additional obligations to continue to hire available domestic workers. Here, however, to hold the private Defendants liable under the Act for failing to use the Plaintiffs' labor after the visas were approved

would be no more reasonable than finding them liable for their visa application. When the INS granted the petitions it said essentially that because of the exigencies of the situation an exception was being made for the Presidio growers that year—that they need not do what would be necessary to enable them to use domestic workers. Since the Court has found that the Plaintiffs would not have chosen to go had they been given the option to live in Ojinaga, the private Defendants are not liable to the Plaintiffs under the Act for failing to use their labor.

Finally, the private Defendants had obligations with respect to the nonimmigrants which can be asserted also by the Plaintiffs, since the temporary foreign labor system is structured so that foreign workers will not work under condition which depress working conditions for domestic workers. Although there was evidence of failure to provide non-adverse effect work terms to the nonimmigrants, even though the private Defendants should be responsible to the Plaintiffs for such a violation, the Plaintiffs' resultant damages are undetermi..able.

The private Defendants, therefore, would not be liable in damages to the Plaintiffs for violations of the Immigration and Nationality Act even if a private right of action were implied. Finally, because the standard of review with respect to the governmental Defendants would not be different under the Immigration and Nationality Act than under the Administrative Procedure Act, no relief is denied the Plaintiffs by not deciding whether to imply a right of action under the Act.

The INS actions here in issue are clearly reviewable under the Administrative Procedure Act. Section 1184 (c) of the Immigration and Nationality Act vests authority over Section 1101(a)(15)(H) nonimmigrant foreign workers in the Attorney General, to be exercised "after consultation with appropriate agencies of the Government. . . ." The authority is delegated to the INS in the Act's corresponding regulations, part 214.2(h)(3) of

which requires a nonimmigrant visa petitioner to submit either a DoL certification that qualified U.S. workers are not available and that the employment of the temporary foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employer or, if such a DoL certification cannot be made, "countervailing evidence that qualified persons in the United States are not available and that the employment policies of the Department of Labor have been observed." 8 C.F.R. § 214.2(h)(3)(1977). DoL certification is governed by C.F.R. § 655.200 *et seq.* which in 1977 was codified in essentially equivalent form at 20 C.F.R. § 602.10.

The INS regulations clearly contemplate approval of visa petitions absent DoL certification. Therefore, the limits of INS discretion are not defined by the Title 20 certification prerequisites, and the Plaintiffs' requested injunction to that effect cannot be granted. Absent strict adherence with that process, however, it is not clear what *is* a sufficient showing of unavailability of domestic workers and observation of DoL policies. Whatever might be sufficient, the Plaintiffs claim essentially that the INS approval involved here was unlawful because no assessment of domestic worker availability was made and the private Defendants were not required to provide non-adverse effect work terms to the nonimmigrant workers.

For DoL certification, domestic workers must be unavailable when offered specified terms which include housing. 20 C.F.R. § 602.10a(b)(1977). Because these employers could not offer housing for hundreds of workers, domestic workers were "unavailable" under the circumstances. Focusing on the moment of Mr. Noto's decision, it is difficult to quarrel with the results of his balancing of the area's threatened economic devastation with an availability testing requirement which physically could not be met.

Viewed from the inception of the Presidio problem, however, the government's actions become more susceptible to criticism. The INS' role in creating the exigency cannot be ignored. Certainly it had a duty to enforce the law, and the growers should have prepared to comply with the law much earlier. Since they had not, and since the ultimate question of legal importation of the foreign workers would lie with the INS, the March decision to enforce the border should have come earlier and with better coordination among the growers, DoL and other parts of INS.

More important, however, are the indications that lack of housing was not the sole cause of the failure to assess domestic worker availability. If the Association had accepted the DoL's compromise offer to recruit the limited number of domestic workers for whom there was Presidio housing, then even if domestic workers had been available, had the INS approved visas for the balance because of the housing exigency this would be a different case. This was not done because the Association did not want to offer the non-adverse effect terms, largely because it was under the mistaken impression that it did not have to meet those terms for the foreign workers if no domestic workers were retained.

The INS did not disimbue them of that notion. Thus, in addition to requiring no test of the domestic labor market, the INS approved the nonimmigrants to work under conditions which adversely affect domestic workers. Even though the petitions were approved without DoL certification, the DoL regulations should not have become irrelevant. The INS has the discretion to make an independent finding of domestic workers unavailability in cases in which there was not strict adherence to the DoL recruitment process. It does this, however, against the backdrop of the "employment policies of the Department of Labor" which at the very least means the general policy of protection for U.S. workers. The finding that no

domestic workers will be displaced does not mean that domestic workers elsewhere will not be affected by the conditions and terms under which imported nonimmigrants work. The INS should not have approved the petitions without requiring the employers to meet the work terms which DoL has established to prevent an adverse effect on U.S. workers.

It is not difficult to understand why there has been such resistance to the end of the old way of life in the Presidio Valley, but it is difficult to understand why the government allowed itself to be so manipulated. The entire incident was a shameful subversion of the laws.

FLCRA CLAIMS

The Plaintiffs claim that in recruiting them to work in Presidio the Defendants violated the Farm Labor Contractor Registration Act, 7 U.S.C.A. § 2041 *et seq.*, as follows: (1) that PVF used unregistered farm labor contractors in violation of 7 U.S.C.A. § 2043(c), (2) that Glen Martin failed to make the disclosures required by 7 U.S.C.A. § 2045(b), for which failure all Defendants except PVF are liable, (3) that Glen Martin knowingly gave misleading information in violation of 7 U.S.C.A. § 2044(b)(2), for which all Defendants except PVF are liable, and (4) that Glen Martin failed to comply with the terms of working arrangements in violation of 7 U.S.C.A. § 2044(b)(4), for which all Defendants except PVF are liable.

The Defendants claim (1) that even under the Plaintiffs' version of the facts they had no direct contact with any Defendant other than Glen Martin and therefore have "no standing" (sic) to assert claims against the other Defendants, (2) that the Act applies only to "crew leaders," (3) that Glen Martin is exempt from the Act under Sections 2042(b)(2) and 2042(b)(6), and (4) that none of the Defendants received a "fee" for farm labor contractor services.

To focus only on who spoke with the Plaintiff crew leaders overlooks all applicable corporate and agency law. To focus only on "crew leaders" overlooks the clear intent of Congress to address more than just those immediately above the worker in the worker-to-farmer chain, who are often workers themselves. *Soliz* v. *Plunkett*, 615 F.2d 272, 276-7 (5th Cir. 1980). For Glen Martin to be exempt from the Act under Section 2042(b)(3) he would have to have engaged in farm labor contracting activity solely for his employer, Griffin and Brand, on no more than an incidental basis, and Griffin and Brand would have to have been exempt under Section 2042 (b)(2) as an entity which personally engages in farm labor contracting activity for the purpose of supplying migrant workers solely for its own operation. Since the latter was not shown,* the Court need not address the conflicting treatment that has been given to "incidental basis." *Compare Marshall v. Heringer Ranches, Inc.*, 466 F. Supp. 285, 287-9 (E.D. CA 1979), with *Marshall* v. *Buntings' Nurseries of Selbyville*, 459 F. Supp. 92, 99-101 (D. MD 1978), and *Usery* v. *Golden Gum Growers, Inc.*, 417 F. Supp. 857, 861-2 (M.D. FA 1976). Although Glen Martin was an employee of a properly certified contractor within Section 2042(b)(6), he is thereby exempt only from registration as a contractor and not from other provisions of the Act or regulations. 7 U.S.C.A. § 2043(b). Regarding the requirement that one engage in at least one of the enumerated contracting activities "for a fee," Glen Martin's salary and the Association's fees paid by members both constitute such a "fee." 29 C.F.R. § 41.5; *Marshall* v. *Coastal Growers Association*, 598 F.2d 521, 523-4 (9th Cir. 1979).

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* Griffin and Brand was registered as a farm labor contractor. Whether or not it was required to be by virtue of "Silver Creek" sorts of arrangements with growers (*Marshall* v. *Silver Creek Packing Co.*, 615 F.2d 848 (9th Cir. 1980)), in this instance it was furnishing workers to other association members and not "solely for its own operation."

The Court concludes that the Association was engaged as a farm labor contractor within Section 2042(b) without being registered, and that its members, including PVF, thereby violated Section 2043(c). Part of the Association's efforts resulted in the solicitation of the Plaintiffs by Glen Martin, who was acting as an employee of a registered farm labor contractor, Griffin and Brand, which was acting as an agent of the Association to furnish workers for its membership. In recruiting the Plaintiffs Glen Martin violated Sections 2044(b)(2) and 2045(b). In failing to provide the work that had been arranged, Glen Martin violated Section 2044(b)(4). Griffin and Brand, Glen Martin's employer and the farm labor contractor under whose certificate he worked, is vicariously liable for each of the violations, as is the Association which enlisted the assistance of Griffin and Brand's recruitment resources and authorized Griffin and Brand to obtain workers for its membership. Finally, each of the violations was "intentional" within the terms of Section 2050a(b) of the FLCRA.

CONTRACT CLAIM

The Court concludes that Glen Martin entered and breached legal contracts on behalf of the Association with every crew leader who testified. The legal measure of what the Plaintiffs would have received had the contracts been performed is governed by the DoL non-adverse effect work terms. The number of work hours to which the three-quarter guarantee would have been applied is governed by 20 C.F.R. § 602.10a(h) (1977), and not by the estimates Glen Martin gave to the crew leaders.

CONCLUSION

The INS approval of the visa petitions without evidence that qualified persons in the United States were not available or that the employment policies of the DoL had been observed was contrary to law and an abuse of discretion.

The Defendant PVF is liable to each Plaintiff member or leader of a crew recruited by Glen Martin in the amount of $500.00 for engaging the labor contracting services of the non-registered Association in violation of 7 U.S.C.A. § 2043(c).

The Defendants Glen Martin, Griffin and Brand, and the Association are jointly and severally liable to each Plaintiff member or leader of a crew recruited by Glen Martin in the additional amounts of $500.00 for giving misleading information concerning employment terms in violation of 7 U.S.C.A. § 2044(b)(2), $500.00 for failure to make the disclosures required by 7 U.S.C.A. § 2045(b), and $500.00 for failure to comply with the terms of working arrangements in violation of 7 U.S.C.A. § 2044(b)(4).

The Plaintiffs and private Defendants are instructed to seek agreement on damages due by virtue of the contract claims by October 25, 1982 when a hearing to establish damages will be held before this Court at 9:30 a.m. if agreement has not been reached.

All other requested relief is DENIED.

The Clerk shall send a copy of this Memorandum Opinion to counsel for the parties.

DONE at Brownsville, Texas, this 16th day of September, 1982.

/s/ James DeAnda
JAMES DEANDA
United States District Judge

APPENDIX C

Final Judgment Filed May 2, 1985

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action No. B-77-167

ANTONIA MONTELONGO, *et al.*

vs.

GRIFFIN BELL, *et al.*

FINAL JUDGMENT

This action came on for trial before the Court, the Honorable James DeAnda, District Judge, presiding, and the issues were duly tried and a decision was rendered on September 16, 1982 and the Court found that the Plaintiffs represent a class of persons under Rule 23(b)(2) which consists of all domestic workers who did reside in the South and Southwest in the months prior to June 1977 who were or will be available for agricultural employment in the Presidio Valley of Texas or in the State of Texas. As to this general class, the Court's Memorandum and Order of September 16, 1982 relating to the conduct of the private and government Defendants, officials of the Immigration and Naturalization Service, is

hereby incorporated as a Declaratory Judgment in favor of the Plaintiffs.

This Court further finds that certain of the Plaintiffs represent a subclass under Rule 23(b)(3) to whom notice was given in a notice approved and signed by this Court on May 14, 1981 directed to:

> Agricultural field workers in the Rio Grande Valley of Texas and Mexico who were offered jobs in May and June of 1977 to harvest melons in Presidio, Texas but who were not taken to Presidio.
>
> You are hereby notified that the United States District Court in Brownsville, Texas has ruled that twenty-one (21) farmworkers can bring a class action for money damages against Griffin & Brand of McAllen, Texas, Inc., Presidio Valley Farms, Inc., and the Presidio Valley Farmers Association and that these workers may represent all persons who claim to have been recruited to go to Presidio in June of 1977 but whose contracts were broken by these companies.

Based on the evidence produced at trial and the claim forms filed by persons seeking class membership, and based on the findings of the United States Magistrate resulting from the hearing held on December 6, 1984 on individual class membership, which findings, dated December 18, 1984, this Court adopts and incorporates by reference, the Court concludes that the persons found to be crew members by Magistrate Garza are proper members of the subclass.

It is hereby ORDERED, ADJUDGED AND DECREED that, based on this Court's Memorandum Opinions of the 16th of September, 1982, August 24, 1983, and this date, this Court hereby exercises its discretion to award each named Plaintiff, each crew leader, and each member represented by the Plaintiffs the following:

Five Hundred and No/100 Dollars ($500.00) with interest from September 16, 1982 at the rate of nine percent (9%) against Defendant Presidio Valley Farms as liquidated damages for violation of Plaintiffs' rights under 7 U.S.C. § 2043(c):

As against Defendants Glen Martin, Griffin & Brand, and Presidio Valley Farmers Association, jointly and severally, each named Plaintiff, each crew leader, and each person in the subclass represented by the said Plaintiffs are awarded under the Farm Labor Contractor Registration Act:

> Five Hundred and No/100 Dollars ($500.00) with interest from September 16, 1982 at the rate of nine percent (9%) as liquidated damages for giving misleading information concerning employment terms in violation of 7 U.S.C. § 2044(b)(2);
>
> Five Hundred and No/100 Dollars ($500.00) with interest from September 16, 1982 at the rate of nine percent (9%) as liquidated damages for defendants' failure to make the disclosures required by 7 U.S.C. § 2045(b); and,
>
> Five Hundred and No/100 Dollars ($500.00) with interest from September 16, 1982 at the rate of nine percent (9%) as liquidated damages for said Defendants' failure to comply with the terms of working arrangements in violation of 7 U.S.C. § 2044(b)(4).

Interest thereon will accrue at the post-judgment rate of 9.15% *per annum.*

It is further ORDERED, ADJUDGED AND DECREED that based on Plaintiff's application for attorney fees under the Equal Access to Justice Act as to the federal Defendants and under Art. 2226 Tex. Rev. Civ Stat. Ann. as to the private Defendants, Plaintiffs are awarded $5,475.00 as fees against the federal Defendants, Griffin

Bell, Attorney General of the United States, Leonel Castillo, Commissioner, Immigration and Naturalization Service, and Mario Noto, Deputy Commissioner of the Immigration and Naturalization Service, or their successors in office; $32,077.50 as fees against the private Defendants, Glen Martin, Griffin & Brand, Presidio Valley Farms and Presidio Valley Farmers Association; and $36,210.00 as fees to be awarded jointly and severally against all Defendants. Costs and expenses in the amount of $8,824.68 are awarded to the Plaintiffs against all Defendants, jointly and severally.

It is further ORDERED, ADJUDGED AND DECREED that jurisdiction is reserved by this Court to entertain such further proceedings as may be necessary and appropriate to give proper force and effect to this judgment, implement the recovery of class damages and to pass upon the supplemental applications of Plaintiffs and their attorneys for fees, costs and expenses which may arise from appeals or enforcement of this Judgment.

Execution may issue on all the foregoing, except execution shall be stayed pending further order of this Court on the recovery of attorney fees and costs against the federal Defendants, for the reasons stated in the Court's Memorandum and Order of this date.

This is a Final Judgment.

The Clerk shall send copies of this judgment to counsel for all parties.

DONE in Houston, Texas, this 2nd day of May, 1985.

/s/ James DeAnda
JAMES DEANDA
United States District Judge

APPENDIX D

Order of May 6, 1985 Amending Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action No. B-77-167

ANTONIA MONTELONGO, *et al.*

vs.

GRIFFIN BELL, *et al.*

ORDER AMENDING JUDGMENT

It has come to the Court's attention that, due to a clerical error, the amounts recited on page 4 of the Final Judgment reflect the "lodestar" amount of attorney fees rather than the amount actually awarded by the Court. Therefore, pursuant to Rule 60(a), F.R.Civ.P., the Court hereby ORDERS that the amounts set forth on page 4 of the judgment be AMENDED as follows: $6,570.00 shall be substituted for $5,475.00; $38,493.00 shall be substituted for $32,077.50; and $43,452.00 shall be substituted for $36,210.00.

The Clerk shall attach a true copy of this Order to the Final Judgment, and shall send copies of this Order to counsel for all parties.

DONE in Houston, Texas, this 6th day of May, 1985.

/s/ James DeAnda
JAMES DEANDA
United States District Judge

APPENDIX E

Order of September 12, 1985 Amending Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action No. B-77-167

ANTONIA MONTELONGO, *et al.*

vs.

GRIFFIN BELL, *et al.*

SECOND ORDER AMENDING JUDGMENT

Pending before this Court is the Federal Defendants' Motion to Reconsider Award of Attorneys' Fees. Having considered said motions and the pleadings on file in this matter, the Court is of the opinion that such motion shall be granted.

The motion [1] sets forth that the Government Defendants are opposed to the grant of $43,452.00 in attorneys' fees and $8,824.68 in costs and expenses to be awarded to the Plaintiff against all Defendants, jointly and severally. The Government Defendants suggest that it is virtually impossible to allocate these attorneys' fees, costs and expenses accurately and fairly between Defendants;

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[1] In the Memorandum and Order entered May 2, 1985, the Court expressly granted the Government Defendants leave to file such motion. The Final Judgment entered on May 2, 1985 expressly reserves jurisdiction of this Court to entertain such motion.

therefore they urge the Court to award one-half of the sum of attorneys' fees, costs and expenses, previously awarded jointly and severally, to be evenly divided between the Government Defendants and non-Government Defendants.

The Plaintiffs are not opposed to the division of the amount which was awarded jointly and severally. However, the non-Government Defendants oppose such suggestion because such Defendants oppose any award of attorneys' fees against them.[2] Moreover the non-Government Defendants oppose such an evenly divided award based on the contention that Plaintiffs have failed to meet the burden of establishing a right to attorneys' fees and costs. Such contention is contrary to the findings of the Court. In the Memorandum and Order dated May 2, 1985, the Court found that the Plaintiffs' attorney had expended 482.2 hours in the successful prosecution of the lawsuit but which could not be segregated in any meaningful fashion between the Government Defendants and non-Government Defendants. Based on a review of the record, the Court concludes that the non-Government Defendants' objections to the motion to reconsider are without merit.

Accordingly, it is hereby ORDERED that the first and only full paragraph on page 4 of this Court's Final Judgment of May 2, 1985, be AMENDED to read as follows:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that based on Plaintiffs' Application for Attorneys' Fees under the Equal Access of Justice Act as to the Federal Defendants and under Article 2226, Tex.Rev.Civ.Stat.Ann., as to the private Defendants, Plaintiffs are awarded $6,570.000 as fees against the Federal Defendants, Griffin Bell, Attorney General of the United States, Leonel Castillo, Commissioner, Immigration and Naturalization Service, and Mario Noto,

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[2] This issue is now on appeal before the Fifth Circuit.

Deputy Commissioner of the Immigration and Naturalization Service, or their successors in office; $38,493.00 as fees against the private Defendants, Glen Martin, Griffin & Brand, and Presidio Valley Farms and Presidio Valley Farmers Association; Plaintiffs are also awarded $43,452.00 in Attorneys' Fees in the form of $21,726.00 against Federal Defendants and $21,726.00 as against private Defendants. Costs and expenses in the amount of $4,412.34 are awarded to Plaintiffs against the Federal Defendants and costs and expenses in the amount of $4,412.34 are also awarded to Plaintiffs against the private Defendants.

The Clerk shall attach a true copy of this Order to the Final Judgment and shall send copies of this Order to Counsel for all parties.

DONE in Houston, Texas, this 12th day of September, 1985.

/s/ James DeAnda
JAMES DEANDA
United States District Judge

APPENDIX F

Opinion of the United States Court of Appeals for the Fifth Circuit

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-2412

ANTONIA MONTELONGO, *et al.*,
Plaintiffs-Appelles
Cross-Appellants,

v.

EDWIN MEESE, III, Attorney General, *et al.*,
Defendants,

GLEN MARTIN, *et al.*,
Defendants-Appellants
Cross-Appellants

Appeals from the United States District Court
for the Southern District of Texas,
Brownville Division

Before BROWN, REAVLEY and JONES, Circuit Judges.

REAVLEY, Circuit Judge:

This case arises out of defendant Glen Martin's recruitment of the plaintiff class of migrant farm workers

to harvest cantelopes in the Presidio and Redford Valleys (Presidio) in June 1977. Defendants Martin, Griffen & Brand of McAllen, Inc. (G & B), Presidio Valley Farmers Association (PVFA) and Presidio Valley Farms, Inc. (PVF) appeal the judgment holding them liable to plaintiffs for violations of the Farm Labor Contractor Registration Act (FLCRA), 7 U.S.C. §§ 2041 *et seq.* (repealed 1983).[1] Plaintiffs cross-appeal, contesting the district court's denial of certain alleged class members' claims. We affirm in part, reverse in part and remand for further proceedings.

FACTS

Presidio is a remote agricultural enclave in Southwest Texas, along the Rio Grande River adjacent to the Mexican city of Ojinaga. Until 1977, Presidio growers regularly hired undocumented workers from Ojinaga to harvest their onion, cantelope and pepper crops from May through July or August. In the spring of 1977, however, the immigration and Naturalization Service (INS) decided to enforce the border, cutting off the flow of Mexican workers. Thus faced with no guaranteed supply of workers for their upcoming harvests, Presidio growers joined together to form the Presidio Valley Farmers Association. PVFA's main, short-term objective was to secure enough workers, either domestically or from Mexico, to harvest its members' crops.

Billy Joe Bishop, president and co-owner with G & B of Presidio Valley Farms, was named president of PVFA. On behalf of both PVF and PVFA, he enlisted the help of G & B, a registered farm labor contractor,

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[1] The FLCRA was repealed and replaced by the Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. §§ 1801-72 (1982). Claims arising under the FLCRA, however, survive. *See, e.g., Salazar-Calderon v. Presidio Valley Farmers Association*, 765 F.2d 1334, 1346 n.6 (5th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 1245, 89 L.Ed.2d 353 (1986).

in finding workers for Presidio.[2] Upon learning of the labor crunch, G & B president Othal Brand in turn contacted Glen Martin, G & B's principal farm worker recruiter.[3] Brand told Martin to "do whatever was necessary" to find domestic farm workers for Presidio.

In May and early June, Martin spoke to numerous crew leaders, orally offering them work in Presidio for themselves and their crews. No housing was available, however, and the crew leaders would not go where there was no place to live.

Finally, Martin added housing to the terms of the offer. Thereafter, plaintiffs Crispin Sanchez, Juanita Martinez, Santiago Quintero and Florencio Camacho accepted and began assembling crews; Camacho also asked crew member Jose Flores to help him find additional people. As the work was to begin in mid-June, these crew leaders were told to return between June 9 and 13 for exact departure instructions.

Meanwhile, PVFA had also been negotiating with INS and the Department of Labor (DOL) throughout the spring for 809 temporary worker (H-2) visas for the Mexican workers they had previously employed. After much hesitation, INS suddenly issued the visas on June 9 or 10.

With an adequate supply of workers from across the border, Presidio growers no longer needed domestic crews. Thus, when the crew leaders appeared as agreed for departure instructions, Martin informed them that

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[2] G & B is a large produce growing, packing and sales concern based in the lower Rio Grande Valley with business interests throughout Texas, including the co-ownership of PVF and packing and/or sales agreements with other Presidio growers.

[3] A large part of Martin's duties as director of harvest consisted of the recruitment of farm workers for G & B and its associated operations, by hiring independent crew leaders who came to his office seeking work for their crews.

the deal was off, leaving plaintiffs without work for most of June. Martin did offer work in July in Fort Stockton/Pecos; Martinez and Camacho accepted although most of their crews drifted off to other jobs before that time.

Several crew members brought the present suit soon thereafter, seeking damages against these defendants [4] for breach of the employment agreements and FLCRA violations. Following various delays, a class of the recruited farm workers was certified in 1980, and a bench trial held in 1982.

The district court found that Martin had violated three provisions of the FLCRA, and awarded liquidated damages of $500 to each class member for each violation. Then, applying agency principles, it held G & B and PVFA jointly and severally liable with Martin for these violations. The court further found that PVF had violated another FLCRA provision, and awarded $500 per member for that violation. In addition, it awarded plaintiffs costs and attorney's fees, under Tex. Rev. Civ. Stat. Ann. art. 2226 (Vernon 1971), *repealed & replaced by* Tex. Civ. Prac. & Rem. Code Ann. §§ 38.001-006 (Vernon 1986), and interest as of the date of the liability order. The court also found defendants liable to the four crew leaders on breach of contract claims, but it later determined that they had failed to prove any contract damages.

Notice was then sent to all potential class members. Two hundred and three people filed claims. Defendants challenged numerous claimants; after a hearing in 1984 at which each crew leader identified the members of his

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[4] In addition to defendants here, plaintiffs sued INS and several government administrators for creating the labor crisis in Presidio and bungling the visa process. The court awarded plaintiffs equitable relief and attorney's fees against the government defendants, who have not appealed. For a description of the H-2 visa process in this case, see *Salazar-Calderon*, 765 F.2d at 1338-39, 1341-43.

crew, 159 claims were approved. Final judgment was entered in May 1985, and this appeal followed.

DISCUSSION

Defendants appeal virtually every aspect of the trial court's rulings. In addition, plaintiffs cross-appeal the treatment of certain claims. The issues fall into three general categories: liability and damages; class certification and claims; and interest and attorney's fees.

I. *Liability-Related Issues*

According to defendants, the court committed legal and factual errors in imposing any liability upon them. The court held Martin, G & B and FVFA liable for violating three FLCRA provisions, by failing (1) to inform plaintiffs, in writing, of the correct terms of employment, §§ 2044(b)(2) & 2045(b); and (2) to provide the promised work, § 2044(b)(4). It also held PVF liable under § 2043(c), for dealing with an unregistered farm labor contractor.[5] As the liability of the other defendants

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[5] Enacted in 1963 and amended in 1974, the FLCRA was aimed at eliminating the abusive practices of farm labor contractors, the "middlemen" between the farmer-users and migrant farm workers. *See* S.Rep. No. 202, 88th Cong., 2d Sess. 1, *reprinted in* 1964 U.S.Code Cong. & Ad.News 3690, 3691-93; S.Rep. No. 1295, 93d Cong., 2d Sess. 3, *reprinted in* 1974 U.S.Code Cong. & Ad.News 6441-45; *see generally* Note, *A Defense of the Farm Labor Contractor Registration Act*, 59 Tex.L.Rev. 531 (1981). It should be construed broadly to effectuate its remedial purposes. *Almendarez v. Barrett-Fisher Co.*, 762 F.2d 1275, 1278-83 (5th Cir. 1985); *Soliz v. Plunkett*, 615, F.2d 272, 275 (5th Cir. 1980).

The Act defines "farm labor contractor" as "any person, who, for a fee, either for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports migrant workers . . . for agricultural employment." § 2042(b). Such persons must register as farm labor contractors and comply with other requirements, including furnishing recruited workers with written copies of the employment terms, § 2045(b); correctly stating those terms, § 2044(b)(2); and actually providing the promised employment on

partly depends on the court's findings concerning Martin, we will begin by examining their contentions as to him.

A. *Martin*

Defendants first argue that Martin was exempt from the statute's coverage, under 2042(b)(6), as a full-time employee of a registered farm labor contractor. This argument is nullified by the clear provision of the statute. The exemption applies only to the registration requirements. Although Martin did not need to register as a farm labor contractor, he was bound by all the other provisions of the Act. *See* § 2043(b).

They next contend that he received no "fee" for his services. This argument is equally unmeritorious. The Act defines "fee" to include "any money or other valuable consideration paid or promised to be paid to a person for services as a farm labor contractor." § 2042(c). The district court correctly found that Martin's salary constituted a "fee," for § 2042(c) purposes. *See Castillo v. Givens*, 704 F.2d 181, 197 (5th Cir.) (finding that crew leader's wage constituted fee), *cert. denied*, 464 U.S. 850, 104 S.Ct. 160, 78 L.Ed.2d 147 (1983).

Defendants then claim that Martin is not liable to the plaintiff crew *members* because he had direct contract only with the crew *leaders*. This argument runs contrary to our case law. "[A] person may not insulate himself from the provisions of the Act by simply conducting his activities through underlings who deal more directly with the workers." *Soliz v. Plunkett*, 615 F.2d 272, 277 (5th Cir. 1980).

Defendants last contend that two critical factual findings are unsupported by any "credible" evidence. We review the district court's factual findings under a

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the promised terms, § 2044(b)(4). Farmer-users may also incur liability if they deal with a farm labor contractor without ascertaining that the contractor is properly registered. § 2043(c).

"clearly erroneous" standard. Fed. R. Civ. P. 52(a). This standard

> recognizes and rests upon the unique opportunity afforded the trial court to evaluate the credibility of witnesses and to weigh the evidence. Because of the deference due the trial judge, unless [we are] left with the 'definite and firm conviction that a mistake has been committed,' [we] must accept the trial court's findings.

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 855, 102 S.Ct. 2182, 2189, 72 L.Ed.2d 606 (1982) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948)) (citation omitted).

First, defendants challenge the court's finding that Martin actually recruited plaintiffs. Martin testified, they point out, that he lacked authority to enter into any "contracts" with crew leaders.

We need not decide whether Martin's offer and plaintiffs' acceptance constituted a "contract" or merely an enforceable promise under a promissory estoppel theory: the recruitment system may be *sui generis*. All of the testimony clearly demonstrates that, due to his position, Martin's word carried the authority to send workers out into the fields to work either for G & B or, upon request, for other growers who were expected to pay for that work.

Plaintiffs all testified that Martin had recruited them and their crews to pick cantelopes in Presidio. In addition, Martin himself, in explaining his recruitment system, testified that he lined up willing workers from the lower Rio Grande Valley and then "[t]hey go to Presidio and contact them out there and they take care of [the details]." Depo. of G. Martin at 22; *see also id.* at 17-22, 43-44; T.R. 483. Bishop testified that G & B officers had told him that "if there was a need for people [in

Presidio], let them know and that they would tell these people that there was a job out there if they wanted to come," Depo. of B. Bishop at 55; in fact, the three domestic crews from McAllen who regularly worked for PVF had contracted through G & B before coming, *id.* Furthermore, Martinez and Camacho testified, without contradiction, that Martin offered them jobs in Fort Stockton in July—the offer alone sufficed; there is no evidence that they were required to contact Fort Stockton growers in advance, but simply to show up there to work. In light of this evidence, we find no error in the court's decision to credit plaintiffs' testimony of their recruitment for Presidio.[6]

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[6] In challenging plaintiffs' credibility, defendants rely heavily on G & B payroll records indicating that both Sanchez and Martinez had been working for G & B during and after the time they testified they were ready to leave for Presidio. The court implicitly found, however, that the records did not seriously impeach these crew leaders' testimony. With due deference to the court's opportunity to assess witness credibility, we conclude that the finding is not clearly erroneous.

According to the records, Sanchez worked no full days while he was assembling his crew and only a few hours with a crew of 12 after he scheduled departure date. D.Exs. 8-11. Martinez' crew worked only a half-day on June 9th, the day she testified she went to reecive her departure instructions. Thereafter, the shifting crews she led worked diminishing amounts, some days only a couple of hours, through June 19 when the records stop. D.Exs. 17-18.

The rest of their testimony was fully corroborated by the other crew leaders. To the extent their testimony is inconsistent with the records, the court could reasonably conclude that they had simply forgotten about the work in the five years between the events and the trial. It is not unlikely that plaintiffs, upon discovering that their alternate plans had fallen through, would take whatever work they could find on a day-to-day basis. The evidence indicated that growers in the lower Rio Grande Valley often hired day-to-day in mid-June because their harvests were winding down and workers were leaving for more profitable areas.

Based on this finding, the court determined that Martin had violated § 2044(b)(4) (failure to comply with promised terms); and § 2045(b) (failure to provide written copies of the terms). We agree.

The § 2044(b)(4) violation clearly follows from the finding that Martin recruited plaintiffs; defendants do not dispute that, once the H-2 visas were issued, Presidio growers did not need domestic workers and could not have provided work even if they had come.[7] The § 2045(b) violation is equally clear. Plaintiffs testified that Martin gave them nothing in writing, and Martin himself admitted that he never gives crew leaders written copies of the employment terms.

Second, defendants challenge the court's finding that Martin misrepresented the terms of employment, by offering plaintiffs free housing in Presidio.[8] Mindful of the limited scope of our review, we conclude that this finding is not clearly erroneous.

All admit that almost no housing was available for workers in Presidio; the little housing that did exist was across the river in Ojinaga. Indeed, the growers' main difficulty in securing H-2 visas had been the non-

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[7] Both Martin and G & B clearly knew about PVFA's concurrent negotiations with INS and DOL about the visas. Martin was present during at least one meeting between G & B officers and a Texas Employment Commission agent whom PVFA had contacted pursuant to its efforts to obtain visa approval. *See* P.Ex. 22. Moreover, G & B President Brand personally contacted several government officials to encourage them to issue the visas. *E.g.*, Depo. of O. Brand at 10-23, 36-44; Depo. of B. Bishop at 72-73; Depo. of W. Harris at 49-50.

[8] It is arguable whether Martin also misrepresented the wages, promising $2.50 per hour in contrast to PVFA's standing offer of $2.20 per hour. In light of Bishop's testimony that growers were willing to pay over $2.20 if necessary, we conclude that the offer of $2.50 did not constitute a knowing misrepresentation for § 2044(b)(2) purposes.

existence of housing in Presidio. DOL would not approve the visa applications without first testing the domestic labor market, but no test was possible unless suitable housing could be offered.[9] *E.g.*, P.Exs. 3, 7, 14, 16, 20, 29, 32, 33.

It is also agreed that domestic farm workers will not go to an area without adequate housing. The crew leaders consistently testified that Martin's June offer to them included housing, T.R. 229, 288, 343; Depo. of F. Camacho at 25; *see also* Depo. of J. Flores at 16; because of their responsibility to their crews, they would not have accepted the offer without assurances that housing would be available, *e.g.*, T.R. 255, 294-95. In addition, Martin testified that, when he first started recruiting in early May, no crew leaders were interested after he told them about the scarcity of housing.

Yet, according to Martin, Bishop and Brand, Martin was under great pressure to find workers for Presidio by late May and early June. *See, e.g.*, T.R. 490, 508, 566, 570, 616; Depo. of G. Martin at 16, 34 (finding workers was "high priority item"); Depo. of O. Brand at 25. He was repeatedly told to do whatever was necessary to get people out there to harvest the crops before they were ruined. The promise of housing, the court concluded, was a last-ditch gamble that, after traveling all the way to Presidio, plaintiffs would agree to live in Ojinaga. The evidence supports this conclusion. Martin's liability for the § 2044(b)(2) violation (misrepresentation of employment terms) plainly follows from this finding.

B. *Vicarious Liability*

Applying agency principles, the court held G & B and PVFA jointly liable for Martin's violations.[10] Both de-

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[9] DOL H-2 visa regulations presume that domestic farm workers will not work in an area unless housing is available.

[10] Although the Liability Order refers only generally to "vicarious liability," at the May 2, 1983 hearing, the court explained that

fendants contest that holding because, they claim, the statute does not allow for "vicarious liability."

In accordance with the Act's distinction between farm labor contractors and farmer-users, we have refused to hold farmer-users vicariously liable for the recruiting violation of independent farm labor contractors. *See Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1333-34 (5th Cir. 1985); *see also Jenkins v. S. & A. Claissan & Sons, Inc.*, 449 F. Supp. 216, 26-28 (S.D.N.Y. 1978). G & B and PVFA are not farmer-users, however. Their liability is premised, instead, on the finding that they are farm labor contractors.

Neither case law nor the statute itself abrogates ordinary respondent superior principles. As Martin's employer, G & B was responsible for all of Martin's actions within the scope of his employment. *E.g., De la Fuente v. Stokely-Van Camp, Inc.*, 514 F. Supp. 68, 79 (C.D. Ill. 1981), *modified on other grounds*, 713 F.2d 225 (7th Cir. 1983); *cf. Soliz*, 615 F.2d at 277-78. G & B does not argue that Martin exceeded that scope in recruiting plaintiffs; its liability flows directly from Martin's.[11]

We find no support for the court's application of agency principles to PVFA, however. The record indicates that PVFA enlisted G & B's services as an independent contractor; as G & B's employer, PVFA is not liable for G & B's actions without some wrongful conduct of its own. *See Restatement (Second) of Torts* §§ 409-

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the term meant "agency liability." *See* Transcript of Proceedings of May 2, 1983, at 20.

[11] G & B also argues that it received no "fee" for Martin's services. This argument directly contradicts Othal Brand's testimony, however. Brand testified that, while the company paid Martin's salary, it always received some form of compensation when Martin supplied crews to a grower. *See* T.R. 571, 491-92, 506-08 (testimony of Martin). *Cf. De la Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 235 (7th Cir. 1983); *Alvarez v. Joan of Arc, Inc.*, 658 F.2d 1217, 1221 (7th Cir. 1981).

14 (1965), W. Prosser, *The Law of Torts* § 71, at 468-70 (4th ed. 1971). Yet the court made no specific findings concerning PVFA's participation in or knowledge of Martin's §§ 2044(b) and 2045(b) violations. Unless PVFA contributed to or had reason to know of Martin's misconduct, the blanket imposition of joint and several liability against PVFA cannot stand. We therefore vacate the judgment against PVFA and remand to the trial court for further findings.[12]

On remand, the court may also conclude that PVFA *independently* violated the Act. For example, the court has already found that PVFA's domestic recruiting activities, including the G & B connection that led to plaintiffs' recruitment, made PVFA a farm labor contractor within the meaning of § 2042(b);[13] this finding is not clearly erroneous, *e.g.*, P. Exs. 30-31, 38-43, 48; T.R.

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[12] There is no merit in PVFA's contention that Bishop's only contracts with G & B were in his capacity as PVF president, thereby relieving PVFA of liability for his acts. All of the evidence, including defendants' own testimony, indicates that the recruiting arrangement between Bishop and G & B encompassed the labor needs of all Presidio growers. According to both Bishop and Brand, their discussion focused on the labor crisis in all Presidio, not merely at PVF. *See* T.R. 490, 508, 566, 616; P.Ex. 22; Depo. of B. Bishop at 67. Brand appeared at one of PVFA's June meetings with INS and even offered PVFA $250,000 out of G & B's coffers to build housing for workers in the future. T.R. 558, 561-2; Depo. of O. Brand at 23-24. Brand also told Martin to find workers for the whole area, *e.g.*, T.R. 566; Depo. of G. Martin at 16, 34, and Martin told plaintiffs only that the work would be in Presidio, *e.g.*, T.R. 339-40, 527-28; Depo. of F. Camacho at 21, 26. Although Bishop no doubt included PVF in his request, he was clearly acting primarily as president of PVFA. *Cf. De la Fuente*, 713 F.2d at 236 n. 8 (for purposes of defendant contractor's liability, no distinction between plaintiffs recruited for defendant's operation and those recruited for others).

[13] The court correctly found that the growers' dues constituted a "fee" for PVFA's recruitment services. Bishop testified that the dues were used to defray PVFA's recruiting expenses. *E.g.*, T.R. 629-30.

610-16. PVFA was admittedly not registered, a possible violation of § 2043(a). The court may find other violations; we in no way attempt to substitute our judgment for that of the trial court.

C. *PVF*

The court concluded that PVF violated § 2043(c), by relying on PVFA to meet its 1977 labor needs. Section 2043(c) prohibits farmer-users from utilizing the services of an unregistered farm labor contractor. PVFA, through Bishop, acted as a farm labor contractor in recruiting plaintiffs; it is undisputed that PVFA was not properly registered. To affirm the judgment of PVF's liability, however, we would also have to find that Bishop's contacts with G & B were *exclusively* in his capacity as PVFA president. *Compare Presidio Valley Farmers Association v. Brock*, 765 F.2d 1353, 1357-58 (5th Cir. 1985) (individual growers not liable for PVFA's violations despite unincorporated status), *cert. denied*, —— U.S. ——, 106 S.Ct. 833, 88 L.Ed.2d 804 (1986). We agree with defendants that the record does not support this conclusion.

Plaintiffs have offered no evidence that PVF's labor requests were funnelled through PVFA; indeed, the contrary inference is strong. G & B and Bishop were co-owners of PVF, with a compelling interest in the farm's economic being. This fact alone suggests that they would not have treated PVF's labor needs on a par with those of the other PVFA members. Finding no support in this record for this violation, we reverse the liability finding and corresponding award of damages against PVF.

D. *Damages*

The court awarded $500 in liquidated damages to each plaintiff for each statutory violation. Defendants now contend that the award is too high because it exceeds the

amount plaintiffs could have earned if they had actually gone to Presidio. This argument has no merit.[14]

FLCRA relief need not be measured by actual damages alone. "[T]he purpose of this civil remedy is not restricted to compensation of individual plaintiffs. It is designed also to promote enforcement of the Act and thereby deter and correct the exploitative practices that have historically plagued the migrant farm labor market." *Beliz*, 765 F.2d at 1332. Under § 2050a(b), the court has discretion to award damages "up to and including an amount equal to the amount of actual damages, $500, or other equitable relief" for each violation. In fixing the amount of the award, the court should consider numerous factors, including the nature of the violations, the extent of the defendant's culpability, the total amount of the award, the substantive or technical nature of the violations and the cost—in all senses—to the plaintiffs for bringing the suit. *See Beliz*, 765 F.2d at 1333; *Salazar-Calderon*, 765 F.2d at 1346-49.

Here, the record indicates that the court carefully considered these factors and determined that $500 was appropriate. *Cf. Washington v. Miller*, 721 F.2d 797, 803 (11th Cir. 1983) (affirming maximum damages for nontechnical violations). Defendants have not shown this to be an abuse of discretion.

II. *Class-Related Issues*

Defendants' litany of class-related issues divides into two main groups. They raise numerous issues pertaining to the certification itself and, then, challenge the claims

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[14] Defendants also suggest that the $500 award resulted from the court's belief that it had no discretion to award less than $500. This explanation for the court's award is belied, however, by the court's own remarks, which reflect complete awareness that the amount is discretionary. *See* Transcript of Proceedings of May 2, 1983 at 46.

of individual claimants. Plaintiffs' cross-appeal also involves the claims question.

A. *Class Certification*

First, defendants argue that suits brought under the FLCRA may not be handled as class actions. On the contrary, however, the class action device has frequently been approved in suits under the FLCRA. *E.g., Almandarez v. Barrett-Fisher Co.*, 762 F.2d 1275 (5th Cir. 1985); *De la Fuente*, 713 F.2d at 231-32; *Alvarez v. Joan of Arc, Inc.*, 658 F.2d 1217 (7th Cir. 1981); *Izaguirre v. Tankersley*, 516 F. Supp. 755 (D. Or. 1981); *see also Salazar-Calderon*, 765 F.2d at 1350 (suggesting possibility of class certification on remand of FLCRA unit).

Second, they contend that certification in this case is improper because the claims arise out of alleged oral misrepresentations. Such claims have been found unsuitable for class treatment when individual questions, such as reliance and damages, predominate over class questions. *See, e.g.*, Fed.R.Civ.P. 23(b)(3) 1966 Advisory Committee Notes.

The district court has great discretion in certifying and managing a proposed class action. *Kilgo v. Bowman Transportation, Inc.*, 789 F.2d 859, 877 (11th Cir. 1986); *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 471 (5th Cir. 1986); *see Salazar-Calderon*, 765 F.2d at 1350. Where the court has determined that class certification is appropriate, we may reverse its decision only upon a showing of abuse.

The court acted well within its discretion in certifying this suit as a class action.[15] *See De la Fuente*, 713 F.2d

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[15] Defendants also challenge the conclusionary nature of the certification order. We agree that more detail would be preferable and, were the order all we had, might have remanded for greater specificity. However, we also have the parties' briefs, other orders

225 (FLCRA class action for violations of § 2045 (failure to disclose)). Despite defendants' characterization, the claims are for statutory violations. *Cf. Greenhaw v. Lubbock County Beverage Association*, 721 F.2d 1019, 1024 (5th Cir. 1983) (class device appropriate "enforcing mechanism for congressionally sanctioned goals"). Moreover, due to the system of recruitment, the predominant liability questions are common to all plaintiffs. The job offers Martin made to the four crew leaders were, for the most part, identical; an offer to a crew leader extended equally to all of his crew. *See General Telephone Co. v. Falcon*, 457 U.S. 147, 155, 102 S.Ct. 2364, 2309, 72 L.Ed.2d 740 (1982) (class action " 'peculiarly appropriate' when the "issues involved are common to the class as a whole' and . . . 'turn on questions of law applicable in the same manner to each member of the class' ") (*quoting Califano v. Yamasaki*, 442 U.S. 682, 700-01, 99 S.Ct. 2545, 257-58, 61 L.Ed.2d 176 (1979)); *cf. Alliance to End Repression v. Rochford*, 565 F.2d 975, 979 (7th Cir. 1977) (common issues predominate in pattern-and-pracice suit). Furthermore, the liquidated damages awards obviated any need to resolve individual questions of reliance and damages.

Third, defendants argue that the decision to certify, made three years after institution of the suit, was untimely. We disagree. Although the district court should make its initial ruling on class certification "[a]s soon as practicable after the commencement of an action," Fed. R.Civ.P. 23(c)(1), there is no set deadline by which the court must act. *See Gore v. Turner*, 563 F.2d 159, 165-66 (5th Cir. 1977) (maintenance of class action possible even without explicit Rule 23(c)(1) determination); *see also Chateau de Ville Production, Inc. v. Tams-*

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and the trial record as well as transcripts of the numerous hearings. From these, it is clear that the court not only considered the Rule 23(b)(3) factors initially but also carefully re-evaluated them—and redefined the class—throughout the succeeding five-year period.

Witmark Music Library, Inc., 586 F.2d 962, 966 (2d Cir. 1978) (precipitous action unnecessary). Part of the delay here is attributable to plaintiffs' post-filing discovery efforts; we find no abuse in the court's decision to await those results, *see Grove*, 563 F.2d 159; *Huff v. N.D. Cass Co.*, 485 F.2d 710, 712-13 (5th Cir. 1973). Still more delay resulted from the docket backlog in Brownsville, over which plaintiffs had no control. Especially in light of the unusually timely filing of this case, we do not find that defendants were unduly prejudiced by the delay.

Last, defendants contest the adequacy of the class notice, claiming that it violates Rule 23(c)(2)'s requirement of "the best notice practicable under the circumstances." There is no merit at all to this claim. The rule requires only that notice be mailed individually to "all class members whose names and addresses may be ascertained through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173, 94 S.Ct. 2140, 2150, 40 L.Ed.2d 732 (1974); *cf. In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 178-79 (5th Cir. 1979) (stressing trial court's great discretion over matters of notice and determination of class), *cert. denied*, 452 U.S. 905, 101 S.Ct. 3029, 69 L.Ed.2d 405 (1981). By contrast, the court here not only required plaintiffs to mail individual notice in English and Spanish to all persons they could reasonably locate, it also ordered bilingual radio and newspaper announcements for a sixty-day period in the areas where class members were most likely to be found. In addition, over defendant's objection, plaintiffs personally contacted as many class members as possible. Given the mobile, semi-literate character of the class, these efforts fully satisfied the dictates of Rule 23(c).

B. *Claims and Claimants*

Defendants' first challenge to individual claimants concerns two crew leaders, Martinez and Quintero, and any crew members who could not legally work in Presidio.

These persons, they contend, are not included in the definition of the class.

This contention overlooks what the court did under its broad authority to redefine the class "as appropriate in response to the progression of the case from assertion to facts," *Richardson v. Byrd*, 709 F.2d 1016, 1019 (5th Cir.), *cert. denied*, 464 U.S. 1009, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983). The class, as originally certified, did exclude crew leaders and consist only of "domestic farm workers," defined as United States citizens or aliens lawfully admitted to work in the United States.[16] In conformance with the evidence as the suit progressed, however, the court periodically exercised its discretion to restructure the class. By final judgment, the class included each of the four crew leaders and all recruited crew members regardless of immigration status.[17] Defendants have not shown this to constitute an abuse of discretion. *See Kilgo*, 789 F.2d at 877-78 (no abuse in court's post-trial decision to expand class to include other members where additions simply conformed to evidence at trial); *cf. Holsey v. Armour & Co.*, 743 F.2d 199, 205 (4th Cir. 1984) (no abuse in court's decision to allow two class members to intervene as plaintiffs after trial), *cert. denied*, 470 U.S. 1028, 105 S.Ct. 1395, 84 L.Ed.2d 784

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[16] The only claimant whose immigration status has been expressly challenged is Federico Meza. We note that, although his visa restricted him to work in the Brownsville area, he nevertheless would be included in the group of those lawfully admitted to work in the United States.

[17] At the May 2, 1983 hearing, the court explicitly included Martinez and Quintero: "I am going to redefine the class to include [the crew leaders]." Transcript of Proceedings of May 2, 1983 at 22. The court also approved notice directed to: "Agricultural field workers in the Rio Grande Valley of Texas and Mexico who were offered jobs in May and June 1977 to harvest melons in Presidio, Texas, but who were not taken to Presidio," R. 989, *see also* Transcript of Proceedings of May 2, 1983 at 22-23, and barred inquiry into the immigration status of the people who responded.

(1985). For clarity, however, the judgment should be modified on remand to reflect the precise final definition of the class.

Defendants' next argument concerns the approval of awards to claimants who had either forgotten or never known the details of the Presidio job offers. These claimants, defendants argue, are not entitled to damages because they could have formed no adequate expectations about the promised employment.

This argument, like their earlier misrepresentation and damage arguments, suggests a fundamental misunderstanding of the case. Their liability rests on statutory violations, for which only liquidated damages, not actual damages, were awarded. Regardless of whether crew members expected wages of $2.50 or $2.20 for 8-hour days or 10-hour days in Presidio or the lower Rio Grande Valley, they all shared two basic expectations: the existence of work and the existence of housing. Defendants violated the Act primarily because their actions first created and then destroyed these expectations. Any claimant who suffered as a result is entitled to the relief.[18]

Last, defendants challenge the grant of certain claims, specifically: (1) in the Camacho crew, some Camacho family members, Roberto Blanco, and Layda and Ramon

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[18] We similarly reject defendants' contention that they are somehow relieved of liability because some crew leaders allegedly also failed to comply with the statute. The district court correctly determined that defendants lack standing to raise this issue.

Defendants also challenge the credibility of all of the crew leaders and suggest that we disapprove, on that ground, all of the claims of all of the claimants, particularly those in Martinez's crew and in the Jose Flores contingent of Camacho's crew. We have already substantially approved the court's findings in this extremely factual case; for the same reasons, we reject this credibility challenge here.

We further find no merit in any of defendants' challenges to the facial validity of the claims from themselves.

Perez; and (2) in the Martinez crew, Rolando Palacios and Enedelia Pena. According due deference to both the magistrate and the district court, we find substantial evidence to support their findings as to (1) the Camachos: We see no inconsistency between Camacho's testimony and his family's claims. Although defendants object to the inclusion of Camacho's parents, for example, he expressly testified at trial that they were going: (2) Roberto Blanco: Despite defendants' interpretation of Blanco's testimony, a close reading reveals that his vagueness as to dates results from a linguistic confusion of March with May and June with July. We see nothing to contradict his repeated assertions, corroborated by his name on the original crew list, that he was ready to go with Camacho to work; and (3) Rolando Palacios: Martinez reasonably explained the omission of the trucker Palacios's name from her list,[19] and her trial testimony is not inconsistent. She stated that *she* was taking only the people, but was not asked whether any of the *people* were taking trucks.

On the other hand, the record currently provides slim support for the claims of the two Perezes, and Enedelia Pena. Lucia Perez unequivocally testified twice that her husband and one child were not going; at the hearing, Camacho did not adequately explain the basis of their claims. Similarly, Martinez clearly stated at trial that she was taking only three of her children, none of whom was Enedelia Pena; her cryptic explanation at the hearing sheds no real light on the merits of Pena's claim. With the exception of these three people, however, we affirm the awards to the approved claimants and turn now to plaintiffs' cross appeal, which is directed solely at the rejection of certain persons who claimed to be members of the class.

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[19] Sanchez also testified that he had originally omitted truckers from his list. The lists contained "crew members" whereas the truckers constituted a separate category of workers.

Plaintiffs contend that no self-proclaimed crew member should be excluded from the class without being given an opportunity to substantiate his claim. We agree.[20] *See* H. Newburg, *Class Actions* § 4600 (1977); *cf. Greenhaw*, 721 F.2d at 1032-33 (no abuse of discretion in court's order requiring claimants to appear to substantiate claims). A few of the rejected claims, such as that of Santa Reyna and possibly those of Irene Jaramillo, Tomasa Jaramillo, George Luis Rangel, Eubin Gomez and Emilio Vargas, appear meritorious on the existing record. Beyond the information on the claims forms, we know nothing about most of the others. The crew leaders' lists, while strong evidence of class membership, should not alone serve as a basis for excluding any claimant who wants and is able to prove the merits of his claim. Accordingly, we remand, for further proceedings, the claims of the following individuals:

1. Aniceto Alonzo, Olga Garza, Guadalupe Olvera, Juan Olvera, Eloisa Quintero, Guadalupe Quintero, Jesus Quintero, Margarita Quintero, George Luis Rangel, Guadalupe Valdez (Quintero's list);

2. Angelica Cantu, Jorge Contreras, Eubin Gomez, Maricela Gonzales, Irene Jaramillo, Tomasa Jaramillo, Alfredo Montelongo, Layda Perez, Ramon Perez, Santa Reyna, Pedro Ruiz, Emilio Vargas, Rosa Maria Vargas, Aurora Villanueva (Camacho's list);

3. Vicente Gillian, Emedelia Pena, Jesusita Vasquez (Martinez' list); and

4. Jose Ismael Anaya, Maria Graciela Arriaga, Pedro Cantu, Raul Cantu, Rosendo Cantu, Jesusa

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[20] We do not agree, however, that the burden of proof is "almost nil." Plaintiffs' cases refer to proof of the *measure* of damages whereas the issue here is each claimant's entitlement to—or the *fact* of—any damages. *E.g., In Re Plywood Antitrust Litigation*, 655 F.2d 627, 635 (5th Cir. 1981).

Flores,[21] Jose Flores, Jr., Armando Fuentes, Pablo Lopez, Arturo Loredo, Elijio Loredo, Sr., Janie Loredo, Linda Loreda, Petra Loredo, San Juanita Loredo, Antonio Morales, Eliseo Silva, Juan Silva (Flores' list).

III. *Other Issues*

A. *Prejudgment Interest*

The court entered its "Liability Order" in 1982, three years before final judgment. At that time, the court ordered that a kind of interim interest of 9% per year begin to accrue on the awards. Analogizing to the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216 (1982), defendants now claim that "prejudgment interest" is barred on any liquidated damages award. *See Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 715, 65 S.Ct. 895, 906, 89 L.Ed. 1296 (1945).

We are not persuaded by defendants' analogy; the FSLA provision differs significantly from that of the FLCRA.[22] Nevertheless, plaintiffs are not entitled to interest, prejudgment, on their award in this case and, therefore, we reverse.

Interest before final judgment is generally awarded to compensate a plaintiff fully for an actual monetary loss he has suffered as a result of a defendant's breach of an obligation. *See Rodgers v. United States*, 332 U.S. 371, 373, 68 S.Ct. 5, 7, 92 L.Ed. 3 (1947). Its assessment furthers the purpose of making the injured plaintiff whole. *Cf. Illinois Central Railroad Co. v. Texas Eastern*

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[21] The birthday of Jesusa Flores is partially crossed out, but it may read "1966." In that case, of course, she was ineligible to file a claim.

[22] A plaintiff under the FSLA is entitled to both compensatory and liquidated damages whereas an FLCRA plaintiff may receive either one or the other.

Transmission Corp., 551 F.2d 943, 944 (5th Cir.1977) (contrasting actual damages with penalties, on which prejudgment interest does not usually accrue). Thus, had plaintiffs chosen to recover actual damages, interest—from the date of breach—would no doubt have been appropriate. They made no real attempt to prove actual damages, however, but instead requested only liquidated damages—in an amount which no one argues is related to the actual losses suffered. Interest from the date of the order does not serve to make them any more whole. While we do not condone defendant's dilatory tactics, we find no legal basis for the court's hybrid interest award.

B. *Attorney's Fees*

The court awarded plaintiffs attorney's fees under Tex. Rev.Civ.Stat.Ann. art. 2226 (Vernon 1971), *repealed & replaced by* Tex.Civ.Prac. & Rem.Code §§ 38.001-006 (Vernon 1986). *Compare Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 137-38 (3d Cir.1984) (awarding attorney's fees for both FLCRA and related state labor law violations where state labor law provided for fee award). Defendants contest the legal basis for this award.

We agree that an award under article 2226 was inappropriate on the facts of this case. Article 2226 authorizes attorney's fees in suits for common law breach of an oral contract. Here, only the four crew leaders pursued common law contract claims; the vast majority of attorney time may not be covered by the statute. More importantly, we do not find that the crew leaders "prevailed" on their contract claims. Despite the liability finding, the court concluded they had not established any right to recover damages for these claims. Texas courts do not allow article 2226 awards where the plaintiff is not the prevailing party and has recovered no damages on his claim. *See James Holmes Enterprises, Inc. v. John Bankston Construction & Equipment Rental, Inc.*, 664 S.W.2d 832, 834 (Tex.App.—Beaumont 1983, writ

ref'd n.r.e.). Accordingly, we vacate the award under article 2226.

Plaintiffs clearly prevailed on their FLCRA claims, however. Even in the absence of a statutory provision,[23] federal courts may award attorney's fees to a prevailing plaintiff if the losing party has been guilty of bad faith. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-59, 95 S.Ct. 1612, 1622, 44 L.Ed.2d 141 (1975); *Alvarez v. Longboy*, 697 F.2d 1333, 1340 (9th Cir.1983) (suggesting possibility of such an award in FLCRA case). The court here hinted that plaintiffs' might be entitled to an award on a bad faith theory, but it did not rule on this alternate ground. As we cannot substitute our opinion for the trial court's, we remand the case for further findings. Defendants have not contested the amount previously awarded. Should the court determine that defendants' conduct justifies an award of attorney's fees, this issue, as well as the remaining claims, can presumably be resolved without further appeal.

CONCLUSION

We reverse the judgment against Presidio Valley Farms, Inc., the judgment in favor of Enedelia Pena, Layda Perez and Ramon Perez, and the award of prejudgment interest. We remand the cause for reconsideration of the claims of the enumerated persons and for further consideration of the claim against Presidio Valley Farmers Association and for attorney's fees. Otherwise, the judgment may be affirmed.

AFFIRMED in part, REVERSED in part, and REMANDED.

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[23] The FLCRA does not itself provide for an award of attorney's fees. *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1336 (5th Cir. 1985); *Alvarez v. Longboy*, 697 F.2d 1333, 1340-41 (9th Cir. 1983).

EDITH HOLLAN JONES, Circuit Judge, dissenting:

While I concur in much of the majority's opinion, I feel compelled to dissent on two points. The most important point is the excessive nature of the judgment. The opinion of the majority neglects to report the amount of the judgment here awarded against the defendants. That judgment was in excess of $466,000 at the date of entry in April, 1985, making it by far the largest judgment ever awarded against farm labor contractors for violations of FLCRA.[1] The standards used by this court to test FLCRA awards, a comparison of awards in other cases for FLCRA violations, and the context of defendants' violations all overwhelmingly indicate that the district court exceeded the bounds of reason in its award of damages.

In *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317 (5th Cir.1985), this court noted several factors that should be considered in awarding FLCRA liquidated damages:

> Whether an award accomplishes this [deterrent] purpose, in addition to affording compensation, is determined by considering not only *the amount allowed to each plaintiff for each violation* but also *the total amount of the award, the nature and persistence* of the violations, the extent of the *defendant's culpability, damage awards in similar cases, the defendant's ability to prevent future violations of the act, the substantive or technical nature of the violations, and the circumstances of each case.* . . .

765 F.2d at 1332. *See also Salazar-Calderon v. PVFA*, 765 F.2d 1334, 1347 (5th Cir.1985) (refusing to upset

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[1] Because this court reverses a portion of the judgment, the amount affirmed is actually $238,500 in statutory liquidated damages of $1,500 for each of 159 plaintiffs plus a possible award of attorney's fees. Even as modified, the judgment is several times larger than any comparable award I could find.

FLCRA damage award where "the district court supported its decision with factors that could properly be considered by it"). According to these cases, the district court is required to articulate the factors that lead to its statutory damage award.

A variety of factors must be considered, because FLCRA contains both "technical" and "substantive" regulatory features whose impact upon the plaintiff farmworkers may vary widely. The deterrent potential of the award must be tempered with consideration of its realistic effect upon the farmer or contractor. As this court suggested in *Salazar-Calderon*, the success of farmers and farmworkers along the Rio Grande is intertwined and mutually dependent. Overly punitive assessment of FLCRA awards could endanger the already precarious state of domestic agriculture and thus indirectly harm the very people FLCRA was designed to protect. 765 F.2d at 1347.

The district court in this case awarded each plaintiff the maximum statutory penalty ($500.00) on each of four FLCRA violations, three of which were technical in nature. Contrary to the statement in the majority opinion that, "the record indicates that the court carefully considered these factors and determined that $500 was appropriate," I find no written or oral statement by the district judge concerning the egregious size of the damage award. This fact alone should require remand for a reassessment of damages.

The only substantive FLCRA violation in this case is defendants' failure to comply with the promised terms of employment of the farm workers. 7 U.S.C. § 2044(b)(4). Although withdrawal of the offers of employment to the crewleaders is regrettable, it can hardly be denied that the facts underlying this violation were unique and not likely to be repeated. The Presidio Valley farmers were left hanging by the Federal Immigration and Naturalization Service while that federal agency dithered over

whether to grant visas for seasonal non-immigrant laborers, who had always harvested the canteloupes in the past. Naturally the farmers had to try to hire workers from any source in the event INS should deny clearance for workers from Ojinaga, Presidio's sister-city across the Rio Grande. This situation, which persisted within two or three weeks of harvest time, was desparate, requiring desperate measures on the part of Glen Martin and whoever else was recruiting for the farmers. Desperation does not justify failure to comply with the terms of employment, but it explains the need to hire domestic workers from the Valley and represents a unique set of conditions for the violation. Because of the INS-created turmoil, the "nature and persistence of the violations," a factor mentioned in *Beliz*, does not, in my view, weigh heavily against the defendants. Even if the substantive FLCRA violation warranted the maximum penalty, however, the district court failed to distinguish between it and two technical violations (failure to provide written copies of the terms of employment and the representation of free housing), and penalized the defendants the maximum amount for those as well. By appellees' own admission, the actual damages suffered by each class member could not have exceeded $500. Record at 736. Moreover, the record establishes that many if not most class members mitigated damages by working for Defendant Griffin & Brand when the Presidio employment prospect vanished. Yet, the district court made no attempt to explain why a huge dividend to the class was required to fulfill FLCRA's policy.

The award in this case dwarfs other FLCRA judgments. An award of $500 per plaintiff per violation has been made in only one other germane case [2], *Washington*

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[2] Both *Espinoza v. Stokley-Van Camp, Inc.*, 641 F.2d 535, 539 (7th Cir. 1981), and *Rivera v. Adams Packing Co.*, 707 F.2d 1278 (11th Cir. 1983) also involved an award of $500 per plaintiff per violation, but these cases did so on the belief that FLCRA man-

v. Miller, 721 F.2d 797 (11th Cir. 1983), but that case involved only seven plaintiffs and flagrant, uncontested, substantive FLCRA violations (housing in violation of health codes, failure to keep required records, failure to disclose terms and conditions of employment, and failure to provide itemized earning statements). Moreover, the total award is also unparalleled. *See Beliz, supra* ($200 per worker against the grower and $500 per worker against the FLCRA contractor; 21 plaintiffs [approximately $14,700]); *Salazar-Calderon, supra* ($15 per violation per class member, 5 violations, "over 150 persons"); *Washington, supra* (total FLCRA award approximately $17,000); *Alvarez v. Longboy*, 697 F.2d 1333 (9th Cir. 1983) ($150 per plaintiff, 92 plaintiffs, total award: $13,800); *Alvarez v. Joan of Arc, Inc.*, 658 F.2d 1217 (7th Cir. 1981) (total award approximately $30,000); *De la Fuente, supra* ($100 per worker per season [approximately $115,000]).

The unaccountable disparity between the award in the instant case and those in other FLCRA cases is even more poignant because several factors suggest that the defendants should have received some leniency from the district court. As noted, the circumstances leading to the violation are not likely to recur. Unlike many FLCRA cases where the existence of substantive FLCRA violations was uncontested, *see, e.g., Washington, Rivera, Alverez*, liability was hotly contested in this case. Additionally, the record reevals that many of the plaintiffs suffered no actual damages from the defendants' conduct, as they were given other work by these defendants them-

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dated this approach. This circuit has rejected this interpretation of FLCRA. *See Salazar-Calderon v. PVFA, supra.* However, like *Washington*, both of these cases involved flagrant, glaring FLCRA violations, the fact of which does not appear to have been seriously questioned. As such, they are distinguishable from a case such as this where factual culpability was hotly contested and where the majority of the violations were technical in nature.

selves.[3] The credibility of many of the plaintiffs' claims was also severely undermined by documentary evidence,[4]

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[3] For example, the Martinez crew worked for G & B in Mission, Texas from June 1 until June 19, a period that they would have been working in Presidio. The Sanchez crew also worked for G & B from June 2 until June 16.

[4] Juanita Martinez testified that Glen Martin had offered her crew work in Presidio beginning June 9, 1977, that she and her crew had no work from the end of May until the beginning of July, and that she had actually assembled a crew and was ready to leave for Presidio on June 9. On cross-examination, however, she was confronted with payroll records, signed by Mrs. Martinez, that showed that her crew worked in Mission for G & B from June 1 until June 19. [Tr. 539 *et seq.*] Faced with this evidence, Mrs. Martinez claimed that she had made a mistake and that she and her crew were to go to Presidio on *July* 9, a date when the Presidio harvest would have been long over.

Crispin Sanchez testified that Martin recruited him and his crew during that last days of May for the Presidio harvest, that he spent the first two weeks of June without work, during which time he was getting his crew ready to go to Presidio, and that he was ready to go to Presidio on June 13. However, payroll records (BX 7-11) clearly show that he and his crew were working for G & B from June 2 until at least June 16, seriously undermining Sanchez's claims that he was planning to go to Presidio and that he was getting a crew together at that time.

The Flores crew does not appear to have existed at all until the hearing on damages. There was no evidence that Flores even met with Martin, and thus there was no basis for the district court to hold that the Flores "crew" had any agreement with Martin. Plaintiff-appellees case on Flores is instead based on the testimony at the damages hearing that *Camacho* told Flores to get 20-25 workers together. As Camacho testified at trial that Martin asked him to get together 50-60 hands [Tr. 307], that he, Camacho, was planning to take 53 or 54 hands to Presidio [Tr. 313], and that the plaintiffs' original petition alleged that the Camacho crew was 55 workers, of which Flores was only a member, Camacho's later claim that he was going to take 75 workers, 50 of which were Camacho's and 25 of which were to be Flores', is so utterly contradicted by his own eariler testimony and pleadings as to render it unbelievable.

a fact that was noted by the district court.[5] No distinction was made between technical and substantive violations—both were penalized at the highest possible rate.[6] Nor was there any finding (or, for that matter, any evidence) that any of the defendants were likely to violate FLCRA in the future unless some massive deterrent award was levied.

Unlike the district court in *Salazar-Calderon*, which "was careful to outline the considerations that guided it in determining [damages]," 765 F.2d at 1347, the district court's award here has no articulated basis. Perhaps that is because, tested by awards in other cases, it defies justification. Discretion can be abused, particularly if no attempt is made explicate one's exercise of discretion. It is no palliative, given *Beliz* and *Salazar-Calderon*, to conclude that the district court was within its discretion when, for all that we know from the record, the court may have made his award because he disliked the defendants or their counsel. The district court's failure to discriminate and failure even to articulate the standards for its award cry out for revision.

My second disagreement with the majority lies in the scope of remand to reconsider PVFA's liability. The majority, correctly, finds no support in the record for vicarious liability of PVFA "without some wrongful conduct of its own." Remand to obtain findings whether

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[5] "I don't know that he [plaintiffs' attorney] wants to impeach her [Martinez] any more than she is already impeached." Tr. 547.

[6] *E.g.* PVF was held liable to each plaintiff for $500 for using PVFA, an unregistered farm labor contractor. How plaintiffs were harmed by this violation is not known, and indeed, we have found no legal basis to sustain this award. It is interesting to note than in *Salazar-Calderon, supra*, PVFA's failure to register as a FLCRA contractor was termed a technical violation that gave rise to liquidated damages of $15 per plaintiff. Yet a nearly-identical violation was penalized at a rate 33 times higher by the district court in this case.

PVFA contributed to or had reason to know of Martin's violations of FLCRA is therefore appropriate. The majority goes further than this, however, in opening for remand the question whether PVFA independenly violated the provisions of FLCRA. Quite simply, the district court found no such FLCRA violation by PVFA, *and no party has raised that issue on appeal.* The disrict court's opinion and the parties' briefs discuss PVFA's liability only in terms of its vicarious responsibility for the acts of Glen Martin and/or Griffin and Brand. PVFA's independent culpability is thus being raised *sua sponte*, and without justification, by this court.

Because I firmly believe that the district court's damage award was irresponsibly punitive, I would Vacate and Remand. I would also decline to assist in making the plaintiffs' case on issues of PVFA liability which were not appealed. On these matters, I respecfully dissent.

APPENDIX G

Order of the United States Court of Appeals for the Fifth Circuit Denying Suggestion for Rehearng En Banc

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-2412

ANTONIA MONTELONGO, *et al.*,
Plaintiffs-Appellees
Cross-Appellants,

versus

EDWIN MEESE, III, Attorney General, *et al.*,
Defendants,

GLEN MARTIN, *et al.*,
Defendants-Appellants
Cross-Appellees.

Appeal from the United States District Court for the Southern District of Texas

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ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion 11/05/86, 5 Cir., 198 , —— F.2d ——)

(December 17, 1986)

BEST AVAILA

Before BROWN, REAVLEY, and Jones, Circuit Judges.

PER CURIAM:

(X) Treating the suggestions for rehearing en banc as petitions for panel rehearing, it is ordered that the petitions for panel rehearing are DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

( ) Treating the suggestions for rehearing en banc as petitions for panel rehearing, the petitions for panel rehearing are DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

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APPENDIX H

Farm Labor Contractor Registration Act of 1963 As Amended

(7 U.S.C. 2041 et seq.)

AN ACT—To provide for the registration of contractors of migrant agricultural workers, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Farm Labor Contractor Registration Act of 1963 as amended".

CONGRESSIONAL FINDINGS AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the channels and instrumentalities of interstate commerce are being used by certain irresponsible contractors for the services of the migrant agricultural laborers who exploit producers of agricultural products, migrant agricultural laborers, and the public generally, and that, as a result of the use of the channels and instrumentalities of interstate commerce by such irresponsible contractors, the flow of interstate commerce has been impeded, obstructed, and restrained.

(b) It is therefore the policy of this Act to remove the impediments, obstructions, and restraints occasioned to the flow of interstate commerce by the activities of such irresponsible contractors by requiring that all persons engaged in the activity of contracting for the services of workers for agricultural employment comply with the provisions of this Act and all regulations prescribed hereunder by the Secretary of Labor.

DEFINITIONS

SEC. 3. As used in this Act—

(a) The term "person" includes any individual, partnership, association, joint stock company, trust, or corporation.

(b) The term "farm labor contractor" means any person, who, for a fee, either for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports migrant workers (excluding members of his immediate family) for agricultural employment. Such term shall not include—

(1) any nonprofit charitable organization, public or nonprofit private educational instituion, or similar organization;

(2) any farmer, processor, canner, ginner, packing shed operator, or nurseryman who *personally* engages in any such activity for the purpose of supplying migrant workers solely for his own operation;

(3) any full-time or regular employee of any entity referred to in (1) or (2) above *who engages in such activity solely for his employer on no more than an incidental basis;*

(4) any person who engages in any such activity (A) solely within a twenty-five mile intrastate radius of his permanent place of residence and (B) for not more than thirteen weeks per year;

(5) any person who engages in any such activity for the purpose of obtaining migrant workers of any foreign nation for employment in the United States if the employment is subject to—

(A) an agreement between the United States and such foreign nation; or

(B) an arrangement with the government of any foreign nation under which written contracts for the employment of such workers are provided for and the enforcement thereof is pro-

vided for *through* the United States by an instrumentality of such foreign nation;

(6) any full-time or regular employee of any person holding a certificate of registration under this Act;

(7) any common carrier or any full-time regular employee thereof engaged solely in the transportation of migrant workers;

(8) any custom combine, hay harvesting, or sheep shearing operation; or

(9) any custom poultry harvesting, breeding, debeaking, sexing, or health service operation, provided the employees of the operation are not regularly required to be away from their domicile other than during their normal working hours.[2]

(c) The term "fee" includes any money or other valuable consideration paid or promised to be paid to a person for services as a farm labor contractor.

(d) The term "agricultural employment" means employment in any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), or section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)) *and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.*

(e) The term "Secretary" means the Secretary of the United States Department of Labor or his duly authorized representative.

(f) The term "State" means any of the States of the United States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, and Guam.

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[2] See 3(b) (10) Page 9.

(g) The term "migrant worker" means an individual whose primary employment is in agriculture, as defined in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), or who performs agricultural labor, as defined in section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)), on a seasonal or other temporary basis.

CERTIFICATE OF REGISTRATION REQUIRED

SEC. 4. (a) No person shall engage in activities as a farm labor contractor unless he first obtains a certificate of registration from the Secretary, and unless such certificate is in full force and effect and is in such person's immediate possession.

(b) A full-time or regular employee of any person holding a valid certificate of registration under the provisions of this Act shall not, for the purpose of engaging in activities as a farm labor contractor solely on behalf of such person, be required to obtain a certificate of registration hereunder in his own name. Any such employee shall be required to have in his immediate personal possession when engaging in such activities such identification as the Secretary may require showing such employee to be an employee of, and duly authorized to engage in activities as a farm labor contractor for, a person holding a valid certificate of registration under the provisions of this Act. Except as provided in the foregoing provisions of this subsection, any such employee shall be subject to the provisions of this Act and regulations prescribed hereunder to the same extent as if he were required to obtain a certificate of registration in his own name.

(c) No person shall engage the services of any farm labor contractor to supply farm laborers unless he first determines that the farm labor contractor possesses a certificate from the Secretary that is in full force and effect at the time he contracts with the farm labor contractor.

(d) Upon determination by the Secretary that any person knowingly has engaged the services of any farm labor contractor who does not possess such certificate as required by subsection (c) of this section, the Secretary is authorized to deny such person the facilities and services authorized by the Act of June 6, 1933 (48 Stat. 113; 29 U.S.C. 49 et seq.), commonly referred to as the Wagner-Peyser Act, for a period of up to three years.

ISSUANCE OF CERTIFICATE OF REGISTRATION

SEC. 5 (a) The Secretary shall, after appropriate investigation, issue a certificate of registration under this Act to any person who—

(1) has executed and filed with the Secretary a written application subscribed and sworn to by the applicant containing such information (to the best of his knowledge and belief) concerning his conduct and method of operation as a farm labor contractor as the Secretary may require in order effectively to carry out the provisions of this Act;

(2) has filed, within such time as the Secretary may prescribe, proof satisfactory to the Secretary of the financial responsibility of the applicant or proof satisfactory to the Secretary of the existence of a policy of insurance which insures such applicant against liability for damages to persons or property arising out of the applicant's ownership of, operation of, or his causing to be operated any vehicle for the transportation of migrant workers in connection with his business, activities, or operations as a farm labor contractor. *In no event shall the amount of such insurance be less than the amount currently applicable to vehicles used in the transportation of passengers in interstate commerce under the Interstate Commerce Act and regulations promulgated pursuant thereto, or amounts offering comparable protection to persons or property from damages arising out of*

the applicant's ownership of, operation of, or his causing to be operated any vehicle as provided herewith: Provided, That the Secretary shall have the discretion to issue regulations requiring insurance in the highest amounts feasible which are less than the amounts currently applicable to vehicles used in the transportation of passengers in interstate commerce under the Interstate Commerce Act and regulations promulgated pursuant thereto, if the Secretary, after due and careful consideration, determines that the insurance coverage in such amounts is not available to farm labor contractors in the same manner and in the same amounts as such coverage is available to other carriers used to transport passengers in interstate commerce;

(3) has filed, within such time as the Secretary may prescribe, a set of his fingerprints;

(4) has filed, under such terms as the Secretary may prescribe, a statement identifying each vehicle to by the applicant for the transportation of migrant workers, and all real property to be use by the applicant for the housing of migrant workers, during the period for which registration is sought, along with proof that every such vehicle and all such housing currently conform to all applicable Federal and State safety and health standards to the extent that such vehicle and all such housing are under the applicant's ownership or control; and

(5) has consented to designation of the Secretary as the agent available to accept service of summons in any action against such farm labor contractor at any and all times during which such farm labor contractor has departed from the jurisdiction in which such action is commenced or otherwise has become unavailable to accept service, under such terms and conditions as are set by the court in which such action has been commenced.

(b) Upon notice and hearing in accordance with regulations prescribed by him, the Secretary may refuse to issue, and may suspend, revoke, or refuse to renew a certificate of registration to any farm labor contractor if he finds that such contractor—

(1) knowingly has made any misrepresentations or false statements in his application for a certificate of registration or any renewal thereof;

(2) knowingly has given false or misleading information to migrant workers concerning the terms, conditions, or existence of agricultural employment;

(3) has failed, without justification, to perform agreements entered into or arrangements with farm operators;

(4) has failed, without justification, to comply with the terms of any working arrangements he has made with migrant workers;

(5) has failed to show financial responsibility satisfactory to the Secretary required by subsection (a) (2) of this section or has failed to keep in effect a policy of insurance required by subsection (a) (2) of this section;

(6) has recruited, employed, or utilized, *with knowledge,* the services of *any person, who is an alien not lawfully admitted for permanent residence, or who has not been authorized by the Attorney General to accept employment;*

(7) has been convicted of any crime under State or Federal law relating to gambling or to the sale, distribution, or possession of alcoholic liquors in connection with or incident to his activities as a farm labor contractor; or has been convicted of any crime under State or Federal law involving robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder,

rape, assault with intent to kill, assault which inflicts grievous bodily injury, *prostitution, or peonage; where the date of the judgment of conviction of any crime as specified herein has been entered within a period of five years preceding the action of the Secretary under this subsection;*

(8) has failed to comply with rules and regulations promulgated by the Interstate Commerce Commission that are applicable to his activities and operations in interstate commerce;

(9) knowingly employs or continues to employ any person to whom subsection (b) of section 4 of this Act applies who has taken any action, except for that listed in paragraph (5) of this subsection, which could be used by the Secretary under this subsection to refuse to issue a certificate of registration;

(10) has failed to comply with any of the provisions of this Act or any regulations issued hereunder;

(11) is not in fact the real party in interest in any such application or certificate of registration and that the real party in interest is a person, firm, partnership, association, or corporation who previously has been denied a certificate of registration, has had a certificate of registration suspended or revoked, or who does not presently qualify for a certificate of registration; or

(12) has used a vehicle for the transportation of migrant workers, or has used real property for the housing of migrant workers, while such vehicle or real property failed to conform to all applicable Federal and State safety and health standards, to the extent any such vehicle or real property has come within the ownership or control of such farm labor contractor.

(c) A certificate of registration, once issued, may not be transferred or assigned and shall be effective for the remainder of the calendar year during which it is issued, unless suspended or revoked by the Secretary as provided in this Act. A certificate of registration may be renewed each calendar year upon approval by the Secretary of an application for its renewal.

(d) Persons issued a certificate of registration under this section shall provide the Secretary a notice of each and every address change within ten days after such change. The Secretary shall maintain a public central registry of all persons issued certificates of registration under this section. Persons issued a certificate of registration under this section shall provide to the Secretary documentation required under section 5(a)(4) of the Act applicable to any vehicle which the applicant obtains for use in the transportation of migrant workers and any real property which the applicant obtains or learns will be used for the housing of migrant workers during the period for which the certificate of registration is issued, within ten days after he obtains or learns of the intended use of such vehicle or real property, to the extent that such vehicle or such real property is under the ownership or control of such persons who have been issued certificates of registration.

OBLIGATIONS AND PROHIBITIONS

SEC. 6. Every farm labor contractor shall—

(a) carry his certificate of registration with him at all times while engaging in activities as a farm labor contractor and exhibit the same to all persons with whom he intends to deal in his capacity as a farm labor contractor prior to so dealing *and shall be denied the facilities and services authorized by the Act of June 6, 1933 (29 U.S.C. 49 et seq.), upon refusal or failure to exhibit the same;*

(b) ascertain and disclose to each worker at the time the worker is recruited the following information to the best of his knowledge and belief:

(1) the area of employment,

(2) the crops and operations on which he may be employed,

(3) the transportation, housing, and insurance to be provided him,

(4) the wage rates to be paid him,

(5) the charges to be made by the contractor for his services,

(6) the period of employment,

(7) the existence of a strike or other concerted stoppage, slowdown, or interruption of operations by employees at a place of contracted employment, and

(8) the existence of any arrangements with any owner, proprietor, or agent of any commercial or retail establishment in the area of employment under which he is to receive a commission or any other benefit resulting from any sales provided to such commercial or retail establishment from the migrant workers whom he recruits.

The disclosure required under this subsection shall be in writing in a language in which the worker is fluent, and written in a manner understandable by such workers on such forms and under such terms and conditions as the Secretary shall prescribe.

(c) upon arrival at a given place of employment, post in a conspicuous place a written statement of the terms and conditions of that employment;

(d) in the event he manages, supervises, or otherwise controls the housing facilities, post in a conspicuous place the terms and conditions of occupancy;

(e) in the event he pays migrant workers engaged in agricultural employment, either on his own behalf or on behalf of another person, keep payroll records which shall show for each worker total earnings in each payroll period, all withholdings from wages, and net earnings. In addition, for workers employed on a time basis, the number of units of time employed and the rate per unit of time shall be recorded on the payroll records, and for workers employed on a piece rate basis, the number of units of work performed and the rate per unit shall be recorded on such records. In addition he shall provide to each migrant worker engaged in agricultural employment with whom he deals in a capacity as a farm labor contractor a statement of all sums paid to him (including sums received on behalf of such migrant worker) on account of the labor of such migrant worker. He shall also provide each such worker with an itemized statement showing all sums withheld by him from the amount he received on account of the labor of such worker, and the purpose for which withheld. *He shall additionally provide to the person to whom any migrant worker is furnished all information and records required to be kept by such contractor under this subsection, and all information required to be provided to any migrant worker under this subsection. The Secretary may prescribe appropriate forms for the recording of information required by this subsection;*

(f) refrain from recruiting, employing, or utilizing, with knowledge, the services of any person, who is an alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment;

(g) promptly pay or contribute when due to the individuals entitled thereto all moneys or other things of value entrusted to the farm labor contractor by any farm operator for such purposes; and

(h) refrain from requiring any worker to purchase any goods solely from such farm labor contractor or any other person.

AUTHORITY TO OBTAIN INFORMATION

SEC. 7. The Secretary or his designated representative may investigate and gather data with respect to matters which may aid in carrying out the provisions of this Act. In any case in which a complaint has been filed with the Secretary regarding a violation of this Act or with respect to which the Secretary has reasonable grounds to believe that a farm labor contractor has violated any provisions of this Act, the Secretary or his designated representative may investigate and gather data respecting such case, and may, in connection therewith, enter and inspect such places and such records (and make such transcriptions thereof), question such persons, and investigate such facts, conditions, practices, or matters as may be necessary or appropriate to determine whether a violation of this Act has been committed. *The Secretary may issue subpenas requiring the attendance and testimony of witnesses or the production of any evidence in connection with such investigations. The Secretary may administer oaths and affirmations, examine witnesses, and receive evidence. For the purpose of any hearing or investigation provided for in this chapter, the provisions of sections 9 and 10 of the Federal Trade Commission Act of September 16, 1914 (15 U.S.C. 49, 50) (relating to the attendance of witnesses and the production of books, papers, and documents), are made applicable to the jurisdiction, powers, and duties of the Secretary. The Secretary shall conduct investigations in*

a manner which protects the confidentiality of any complainant or other party who provides information to the Secretary with respect to which the Secretary commences an investigation. The Secretary shall monitor and investigate activities of farm labor contractors in such manner as is necessary to enforce the provisions of this Act.

AGREEMENTS WITH FEDERAL AND STATE AGENCIES

SEC. 8. The Secretary is authorized to enter into agreements with Federal and State agencies, to utilize (pursuant to such agreements) the facilities and services of the agencies, and to delegate to the agencies such authority, other than rulemaking, as he deems necessary in carrying out the provisions of this Act, and to allocate or transfer funds or otherwise to pay or to reimburse such agencies for expenses in connection therewith.

PENALTY PROVISIONS

SEC. 9. (a) Any farm labor contractor or employee thereof who willfully and knowingly violates any provision of this Act shall be fined not more than $500, *sentenced to a prison term not to exceed one year, or both, and upon conviction for any subsequent violation, shall be punishable by a fine not to exceed $10,000 or sentenced to a prison term not to exceed three years, or both. The Secretary shall report on enforcement of the provisions of this Act in the annual report of the Secretary required pursuant to section 9 of the Act entitled "An Act to create a Department of Labor", approved March 4, 1913 (37 Stat. 738, 29 U.S.C. 560). The reporting hereunder shall include, but shall not be limited to, a description of efforts to monitor and investigate the activities of farm labor contractors, the number of persons to whom certificates of registration have been issued, the number of complaints of violation received by the Sec-*

retary and their disposition, and the number and nature of any sanctions imposed.

(b)(1) Any person who commits a violation of this Act or any regulations promulgated under this Act, may be assessed a civil money penalty of not more than $1,000 for each violation. The penalty shall be assessed by the Secretary upon written notice, under the procedures set forth herein.

(2) The person assessed shall be afforded an opportunity for agency hearing upon request made within thirty days after the date of issuance of the notice of assessment. In such a hearing, all issues shall be determined on the record pursuant to section 554 of title 5, United States Code. The agency determination shall be made by final order subject to review only as provided in paragraph (3). If no hearing is requested as herein provided, the assessment shall constitute a final and unappealable order.

(3) Any person against whom an order imposing a civil money penalty has been entered after an agency hearing under this section may obtain review by the United States district court for any district in which he is located or the United States District Court for the District of Columbia by filing a notice of appeal in such court within thirty days from the date of such order, and simultaneously sending a copy of such notice by registered mail to the Secretary. The Secretary shall promptly certify and file in such court the record upon which the penalty was imposed. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence as provided by section 706(9)(E) of title 5, United States Code.

(4) If any person fails to pay (illegible) *has become a final and unappealable order, or after the court has entered final judgment in favor of the agency, the Secretary shall refer the matter to the Attorney*

General, who shall recover the amount assessed by action in the appropriate United States district court. In such action the validity and appropriateness of the final order imposing the penalty shall not be subject to review.

(5) All penalties collected under authority of this section shall be paid into the Treasury of the United States.

(c) Notwithstanding subsections (c) and (b) of this section, any farm labor contractor who commits a violation of subsection 6(f) of the Act or any regulations promulgated thereunder shall upon conviction be fined not to exceed $10,000 or sentenced to a prison term not to exceed three years, or both, if the person committing such violation has failed to obtain a certificate of registration pursuant to this Act or is one whose certificate has been suspended or revoked by the Secretary.

APPLICABILITY OF ADMINISTRATIVE PROCEDURE ACT

SEC. 10. The provisions of the Administrative Procedure Act (6 U.S.C. 1001 and the following) shall apply to all administrative proceedings conducted pursuant to the authority contained in this Act.

JUDICIAL REVIEW

SEC. 11. Any person aggrieved by any order of the Secretary in refusing to issue or renew, or in suspending or revoking, a certificate of registration may obtain a review of any such order by filing in the district court of the United States for the district wherein such person resides or has his principal place of business, or in the United States District Court for the District of Columbia, and serving upon the Secretary, within thirty days after the entry of such order, a written petition praying that the order of the Secretary be modified or set aside in whole or in part. Upon receipt of any such petition, the Secretary shall file in such court a full, true, and

correct copy of the transcript of the proceedings upon which the order complained of was entered. Upon the filing of such petition and receipt of such transcript, such court shall have jurisdiction to affirm, set aside, modify, or enforce such order, in whole or in part. In any such review, the findings of fact of the Secretary shall not be set aside if supported by substantial evidence. The judgment and decree of the court shall be final, subject to review as provided in section 1254 and 1291 of title 28, United States Code.

CIVIL RELIEF

SEC. 12. (a) Any person claiming to be aggrieved by the violation of any provision of this Act or any regulation prescribed hereunder may file suit in any district court of the United States having jurisdiction of the parties without respect to the amount in controversy or without regard to the citizenship of the parties and without regard to exhaustion of any alternative administrative remedies provided herein.

(b) Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action. If the court finds that the respondent has intentionally violated any provision of this Act or any regulation prescribed hereunder, it may award damages up to and including an amount equal to the amount of actual damages, or $500 for each violation, or other equitable relief. Any civil action brought under this section shall be subject to appeal as provided in chapter 83 of title 28, United States Code.

(c) If upon investigation the Secretary determines that the provisions of this Act have been violated, he may petition any appropriate district court of the United States for temporary or permanent injunctive relief.

(d) Except as provided in section 518(a) of title 28, United States Code, relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under this Act but all such litigation shall be subject to the direction and control of the Attorney General.

DISCRIMINATION PROHIBITED

SEC. 13(a) No person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any migrant worker because such has, with just cause, filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceedings or because of the exercise, with just cause, by such worker on behalf of himself or others of any right or protection afforded by this Act.

(b) Any worker who believes, with just cause, that he has been discriminated against by any person in violation of this section may, within one hundred eighty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this section have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action, the United States district courts shall have jurisdiction, for cause shown, to restrain violation of subsection (a) and order all appropriate relief including rehiring or reinstatement of the worker, with back pay, or damages.

RECORDKEEPING

SEC. 14. Any person who is furnished any migrant worker by a farm labor contractor shall maintain all payroll records required to be kept by such person under

Federal law, and with respect to migrant workers paid by a farm labor contractor such person shall also obtain from the contractor and maintain records containing the information required to be provided to him by the contractor under section 6(e) of the Act.

STATE LAWS AND REGULATIONS

SEC. 15. This Act and the provisions contained herein are intended to supplement State action and compliance with this Act shall not excuse anyone from compliance with appropriate State law and regulation.

SEVERABILITY

SEC. 16. If any provision of this Act, or the application thereof to any person or circumstance, shall be held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

RULES AND REGULATIONS

SEC. 17. The Secretary is authorized to issue such rules and regulations as he determines necessary for the purpose of carrying out the provisions of this Act.

WAIVER OF RIGHTS

SEC. 18. Any agreement by an employee purporting to waive or to modify his rights hereunder shall be void as contrary to public policy, except a waiver or modification of rights or obligations hereunder in favor of the Secretary shall be valid for purposes of enforcement of the provisions of the Act.

AUTHORIZATION OF APPROPRIATIONS

SEC. 19. There are authorized to be appropriated to carry out the purposes of this Act such sums as may be necessary for the effective enforcement of this Act.

Approved September 7, 1986 (Public Law 88-582).

Approved December 7, 1974 (Public Law 93-518).

Approved April 5, 1976 (Public Law 94-259).

Approved October 19, 1976 (Public Law 94-561).

3(b)(10)

[2] Any person who would be required to register solely because the person is engaged in any such activity solely for the purpose of supplying full-time students or other persons whose principal occupation is not farmwork to detassel and rogue hybrid seen corn or sorghum for seel and to engage in other incidental farmwork for a period not to exceed four weeks in any calendar year: Provided, That such students or other persons are not required by the circumstances of such activity to be away from their permanent place of residence overnight: Provided further, That such students or other persons, if under 18 years of age, are not engaged in providing transportation in vehicles caused to be operated by the contractor.